No. 24-

IN THE

Supreme Court of the United States

KARL HANSEN,

Petitioner,

v.

TESLA, INC.; ELON MUSK;
U.S. SECURITY ASSOCIATES, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a confirmed arbitration award on related or overlapping claims may be given issue-preclusive effect so as to bar a Sarbanes-Oxley ("SOX") whistleblower claim, notwithstanding 18 U.S.C. § 1514A(e)'s explicit prohibition against forcing SOX claims into predispute arbitration.

2. Whether the court of appeals' holding that an arbitration award confirmed by a district court triggers full preclusive effect over a statutorily non-arbitrable SOX claim contravenes the narrow rule set forth in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and reaffirmed in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), which bars arbitral preclusion of statutory claims that were never authorized for arbitration in the first place.

PARTIES TO THE PROCEEDING

1. **Petitioner:**

   Karl Hansen was the plaintiff in the district court and the appellant in the court of appeals.

2. **Respondents:**

   Tesla, Inc. was a defendant in the district court and an appellee in the court of appeals.

   Elon Musk was a defendant in the district court and an appellee in the court of appeals.

   U.S. Security Associates, Inc. was a defendant in the district court and an appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

1. Tesla, Inc., is a publicly traded company (NASDAQ: TSLA). It has no parent corporation. No publicly held corporation owns 10% or more of its stock.

2. U.S. Security Associates, Inc., is a wholly owned subsidiary of Allied Universal. No publicly held corporation owns 10% or more of Allied Universal's stock.

STATEMENT OF RELATED PROCEEDINGS

United States Court District Court of Nevada

District Court Case No. 3:19-cv-00413-LRH-CSD; *Hansen v. Musk*, 653 F. Supp. 3d 832 (D. Nev. 2023)

Karl Hansen v. Elon Musk; *Tesla Motors, Inc.*; *U.S. Securities Associates, Inc.*,

Dismissal Granted in Favor of Defendants dated January 31, 2023.

United States Court of Appeals for the Ninth Circuit

Case No. 23-15296, *Hansen v. Musk*, 122 F.4th 1162 (9th Cir. 2024)

Karl Hansen v. Elon Musk; *Tesla Motors, Inc.*; *U.S. Securities Associates, Inc.*,

Affirmed, Partial Concurrence and Partial Dissent by Judge Collins dated December 10, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Karl Hansen by and through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Hansen v. Musk*, 122 F.4th 1162 (9th Cir. 2024). The dissenting opinion of Judge Collins is reported at the same citation and is central to this Petition. The district court's order confirming the arbitration award and dismissing Petitioner's Sarbanes-Oxley claim is reported at *Hansen v. Musk*, 653 F. Supp. 3d 832 (D. Nev. 2023).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 10, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1514A(e)(1)–(2) provides:

> (1) "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) "No predispute arbitration agreement shall be valid or enforceable, if the agreement

> requires arbitration of a dispute arising under this section."

9 U.S.C. § 13 of the Federal Arbitration Act provides in relevant part:

> "The judgment [confirming an arbitration award] shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action . . . ."

INTRODUCTION

Congress deemed SOX whistleblower retaliation claims too important to be waived by any predispute arbitration agreement. 18 U.S.C. § 1514A(e). Yet, in the decision below, the court of appeals held that the unfavorable findings contained in an arbitration award (which was later confirmed in federal court) could collaterally estop Petitioner's SOX claim, effectively forcing SOX issues into arbitration via the back door. The panel majority thus allowed the same result Congress explicitly forbade in 18 U.S.C. § 1514A(e).

Judge Collins's dissent to the December 10, 2024 decision correctly reasoned that, under *Alexander v. Gardner-Denver Co., McDonald v. City of West Branch*, and their progeny, an arbitration award by a tribunal expressly barred from hearing a federal statutory claim cannot have the effect of barring that claim in court. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974); *McDonald v. City of West Branch,* 466 U.S. 284 (1984). This rule is narrow but fundamental: *only* if a party agreed to arbitrate that very statutory claim, or

if Congress allowed arbitration of it, can a prior arbitral ruling on a related matter preclude subsequent judicial proceedings.

STATEMENT OF THE CASE AND FACTS

A. Hansen's Initial Allegations and Federal Court Filing

On July 19, 2019, Karl Hansen filed a lawsuit in the United States District Court for the District of Nevada against Tesla, Inc., its CEO Elon Musk, and U.S. Security Associates (USSA) (collectively, "Defendants"). See *Hansen v. Musk*, 653 F. Supp. 3d 832 (D. Nev. 2023). Hansen alleged that Defendants retaliated against him for reporting various forms of misconduct at Tesla's Nevada Gigafactory to both Tesla's own management and the Securities and Exchange Commission (SEC). *Id.*

Hansen's Complaint stated that: (1) he was hired as a protection associate by Tesla in March 2018 and subsequently promoted to an investigations case specialist at the Nevada Gigafactory; (2) he discovered and reported what he believed to be large-scale thefts at the Gigafactory costing tens of millions of dollars; (3) he uncovered alleged narcotics trafficking at the facility tied to Mexican drug cartels; and (4) he reported suspicions of improperly awarded management contracts and raised concerns about potential wiretapping and hacking of employees' communications by Tesla's Senior Manager of Global Security. *Hansen,* 122 F.4th 1162, 1167.

After Hansen brought these findings to Tesla management, information that eventually reached Elon

Musk, Tesla terminated his employment in June 2018 under the stated rationale of "internal restructuring." *Id.* Hansen soon thereafter accepted a position with USSA, a security-services provider under contract with Tesla, and he continued investigating the same alleged thefts and criminal activities at the Gigafactory. *Id.* In August 2018, Hansen filed a formal SEC report documenting his concerns about Tesla's misconduct. *Id.*

Shortly after this disclosure, Musk witnessed Hansen stationed at a Gigafactory entrance and demanded his removal. USSA promptly eliminated Hansen's role at that facility, allegedly in retaliation for his whistleblower activities. *Id.* According to Hansen, this amounted to unlawful retaliation under federal whistleblower laws. *Id.* at 1167–68.

B. Partial Arbitration Ordered; SOX Claim Excluded

In response to Hansen's lawsuit, Defendants moved to compel arbitration for nearly all of Hansen's claims, citing an arbitration provision in his employment agreement with USSA. *Id.* at 1168. Defendants did not, however, seek arbitration of Hansen's SOX whistleblower claim, recognizing that 18 U.S.C. § 1514A(e)(2) bars forcing SOX disputes into arbitration under a predispute agreement. *Id.*

The district court accordingly, (1) granted Defendants' motions to compel arbitration on Hansen's other claims, (2) refused to compel arbitration of the SOX claim given the statutory prohibition, and (3) stayed the SOX action pending completion of the arbitral proceedings, noting that the SOX claim arose out of the same conduct as the claims headed to arbitration. *Id.*

C. Arbitration of Dodd-Frank and Other Claims; Critical Factual Determination

After the district court ordered arbitration, Hansen added additional claims in the arbitral forum, including federal and Nevada RICO causes of action, breach of contract and tortious interference theories, and a Dodd-Frank whistleblower retaliation claim. *Id. at 1168.* The arbitrator dismissed Hansen's RICO claims after determining he failed to establish either a pattern of racketeering or a cognizable injury. *Id.* The arbitrator also granted summary judgment on Hansen's breach-of-contract and certain tortious-interference claims, finding Hansen had no contractual right to remain assigned to Tesla's Gigafactory. *Id.*

On June 8, 2022, the arbitrator issued a final award that rejected Hansen's remaining tortious interference claim and denied Dodd-Frank whistleblower protection. *Id.* at 1168–69. The final award found that: (1) Tesla outsourced employees in Hansen's job classification to USSA rather than taking adverse action because of Hansen's SEC disclosures; (2) Hansen had been discharged from the Gigafactory position for emailing confidential materials to third parties and subsequently deleting those emails; and (3) USSA could not have retaliated for any "protected activity" because it lacked awareness of Hansen's whistleblower disclosures. *Id.* at 1169.

The arbitrator also concluded that Hansen could not have reasonably believed he was reporting securities-law violations, a prerequisite for whistleblower status under both Dodd-Frank and SOX. *Id.* The award emphasized that Hansen's complaints concerned garden variety

theft and drug violations under state or local law, not shareholder or securities fraud, and that Hansen offered no evidence or argument tying his disclosures to federal securities violations. *Id.*

D. Confirmed Arbitral Award Used to Preclude a Critical Element of the Non-Arbitrable SOX Claim, Thus Defeating It

After the arbitrator ruled against Hansen, Defendants moved to lift the stay on the SOX claim and to confirm the arbitral award under 9 U.S.C. § 13. *Id.* Hansen did not oppose confirmation, and on July 25, 2022, the district court confirmed the award, treating it as a final and enforceable judgment. *Id.* at 1169. Defendants next sought dismissal of Hansen's entire lawsuit, including the SOX claim, on grounds of issue preclusion, asserting that the arbitrator's factual findings disposed of whether Hansen had engaged in protected whistleblower conduct or suffered retaliation for it. *Id.* at 1169–70.

The district court granted Defendants' motion, determining that the core factual issues had been "actually litigated and decided" in arbitration. *Id.* Consequently, the court dismissed all of Hansen's claims, including his SOX whistleblower action that was never itself sent to arbitration, based on collateral estoppel. *Id.* Hansen appealed, contending that the district court's reliance on an arbitral award to bar a statutorily non-arbitrable SOX claim contravened 18 U.S.C. § 1514A(e) and Supreme Court precedent. *Id.* at 1170–71.

In essence, the arbitrator's factual determinations on Hansen's Dodd-Frank allegations, particularly whether

he "reasonably believed" he was reporting securities-law misconduct, are now being used to defeat a SOX cause of action that Congress explicitly exempted from mandatory arbitration. *Id.* at 1169. This outcome, Hansen argues, contradicts the clear language of the Sarbanes-Oxley Act and is the central issue in this Petition seeking the Supreme Court's review.

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Ideal Vehicle for Resolving an Important Federal Question and is Ripe for Certiorari in Several Respects.

A. Directly Conflicts with Supreme Court Precedent

As elaborated upon, *infra*, panel majority's ruling conflicts with *Alexander v. Gardner-Denver Co.*, *McDonald v. West Branch*, and *14 Penn Plaza LLC v. Pyett*. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 263 (2009). Those decisions hold that an arbitrator's award cannot preclude a statutory cause of action when Congress has explicitly barred that cause of action from arbitration. Judge Collins's detailed dissent highlights this very conflict, which demonstrates the tumult that will arise if the Ninth Circuit's decision in this matter is allowed to stand.

By allowing the ministerial act of confirmation of an arbitration decision under the Federal Arbitration Act to override the plain text of 18 U.S.C. § 1514A(e), the decision

below disregards the Supreme Court's careful balancing of the FAA against other contrary congressional commands in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). This sharp departure from binding precedent cries out for this Court's supervisory review.

B. Addresses an Important Question of Federal Law That Demands Uniform Resolution

Whether a confirmed arbitration award on related, arbitrable claims can preclude a SOX whistleblower action, expressly deemed non-arbitrable by Congress, is both significant and insufficiently resolved by existing Supreme Court case law. Other circuits may adopt divergent approaches, leaving whistleblowers in different jurisdictions subject to inconsistent standards.

The Sarbanes-Oxley Act is a lynchpin in preventing corporate and securities fraud. If lower courts are free to use arbitral findings as a backdoor means of defeating a SOX cause of action, then this vital federal statute loses its intended force across the country.

C. Grave Public Policy Concerns and the Risk of Forum Shopping

A core purpose of Sarbanes-Oxley is to ensure employees have unfettered access to a judicial forum when exposing suspected fraud. Allowing arbitrators, who are statutorily disqualified from adjudicating SOX claims, to indirectly dispose of those claims via collateral estoppel seriously undermines that purpose.

The panel's approach effectively encourages litigants to steer tangential or related claims into arbitration, then

rush to confirm any adverse factual findings in a friendly district court. This not only fosters forum shopping but also disrupts consistent enforcement of federal whistleblower protections. Such an outcome is squarely against the public interest in exposing and remedying systemic corporate misconduct.

D. This Issue Presents a Clear-Cut Legal Question Squarely Addressed Below

The core dispute, whether a private arbitral award on arbitrable claims can be used to preclude a SOX whistleblower action that Congress has declared non-arbitrable, was placed directly before the district court and the court of appeals. Both courts addressed and definitively resolved this precise issue, thereby creating a record that cleanly presents the question for this Court's review.

Judge Collins's thorough dissent underscores the incompatibility of the majority's approach with *Gardner-Denver Co.*, *McDonald, Pyett,* and their progeny. No further factual development is required, and this Court need not concern its decision with the veracity or efficacy of any factual finding below, nor whether there was any abuse of any standard of discretion by one of the lower courts. Here is posed a pure question of law. This conflict between the Ninth Circuit's interpretation of those precedents is ripe for a conclusive resolution here.

In sum, the tension between the panel's opinion and well-established Supreme Court precedent, the critical importance of SOX whistleblower protections, the danger of forum shopping, and the clean factual record all render

this case uniquely suitable for the Court's plenary review. By granting certiorari, the Court can restore uniformity and uphold Congress's unequivocal mandate that Sarbanes-Oxley whistleblower claims must be resolved in a judicial forum, free from the constraints of pre-dispute arbitration.

II. Federal Common Law Forecloses Using an Arbitral Award to Preclude a Statutorily Non-Arbitrable SOX Claim

A. The FAA's Confirmation Provision Does Not Override SOX's Statutory Exemption

Respondents and the panel majority maintain that once an arbitration award is confirmed under 9 U.S.C. § 13, it automatically acquires full preclusive effect, even over a SOX claim. They assert that declining to give the arbitral award such force would displace the FAA. But as Judge Collins notes, that premise begs the question: there is no irreconcilable conflict between § 13 of the FAA and 18 U.S.C. § 1514A(e). Federal courts routinely look to federal common law to determine the preclusive effect of a federal-court judgment confirming an arbitration award.

Here, Congress has expressly removed SOX whistleblower actions from the scope of mandatory, predispute arbitration. Nothing in § 1514A(e) prohibits confirming an arbitral award as to *other* arbitrable claims; however, that confirmation does not magically endow the arbitrator with authority over a category of claim that Congress has declared non-arbitrable. The question is whether federal common law, a body of law that already accommodates legislative restrictions on arbitration,

permits the confirmed award to estop Petitioner's SOX claim in federal court. As Judge Collins rightly concludes, it does not.

B. The Gardner-Denver Rule Bars Preclusive Effect Where the Arbitrator Lacked Statutory Authority

Under *Gardner-Denver Co.,* and *McDonald*, an arbitrator's findings cannot preclude subsequent litigation of statutory rights if that arbitrator was not authorized to resolve the statutory claims at issue. See *Gardner-Denver Co.*, 415 U.S. 36; McDonald, 466 U.S. 284. In those decisions, the Supreme Court cautioned that when Congress mandates judicial enforceability and explicitly excludes certain claims from arbitration, a private arbitral panel cannot substitute for federal-court adjudication of those rights.

Judge Collins emphasizes that *Pyett* preserves the Gardner-Denver rule in narrow circumstances: the rule applies only where "arbitrators were not authorized to resolve [the] statutory claims." *Pyett* at 264. That principle fits the present case perfectly. By forbidding any predispute arbitration agreement from compelling a SOX whistleblower action, § 1514A(e) strips arbitrators of authority to adjudicate the merits of such claims. Because the arbitrator here lacked statutory authorization, the result reached in arbitration cannot bar Petitioner from litigating his SOX claim in federal court, even if the arbitral award was later confirmed.

C. Confirming the Award Cannot Retroactively Cure the Arbitrator's Lack of Authority

Converting the arbitral outcome into a final, enforceable judgment through court confirmation does not remedy the underlying defect: an arbitral panel cannot determine the outcome of a SOX claim. Confirmation under the FAA is typically a ministerial process, ensuring there was no fraud or act beyond the arbitrator's jurisdiction with respect to the claims that were, in fact, arbitrable. It does not purport to confer jurisdiction over a category of claim that Congress categorically exempted from arbitration.

Judge Collins underscores that *McDonald* rejected the idea that any generic full faith and credit principle automatically binds federal courts to respect an arbitral adjudication of a claim Congress has placed outside the arbitration forum. Pet. App. 1a at 31. Confirmation in federal court does not expand the scope of what the arbitrator could validly decide. Thus, the district court's limited confirmation proceeding does not address whether Petitioner's SOX whistleblower cause of action should have been resolved by an arbitrator at all, it simply ratifies the outcome for the arbitrable claims.

D. Federal Common Law Principles Protect the Statutory Right to a Judicial Forum

Finally, applying the federal common law of preclusion to block Petitioner's SOX suit would run afoul of the legal policy recognized by the Supreme Court that certain claims, like those under Title VII in *Gardner-Denver*, are judicially enforceable and may not be displaced by arbitral factfinding. *See Gardner-Denver Co.*, 415 U.S. 36.

Here, Congress explicitly removed SOX claims from the arbitral domain, underscoring their importance to public enforcement of financial and securities regulations.

In light of that unambiguous legislative choice, an arbitral decision on related but arbitrable matters (like a Dodd-Frank claim) cannot negate Petitioner's right to independent judicial determination of his SOX claim. Allowing the confirmed award to control the factual questions central to the SOX claim, contrary to Congress's clear ban on forced arbitration, would obviate the statutory protection intended by Congress by enacting SOX. Federal common law, as reflected in *Gardner-Denver* and its progeny, preserves the non-arbitrable claim's vitality in federal court.

III. A Confirmed Arbitration Award Cannot Displace Congress's Express Requirement That SOX Whistleblower Claims Be Litigated in a Judicial Forum

Respondents and the panel majority erroneously rely on the fact that the arbitration award here was confirmed in the district court, contending that this transformed it into a "final judgment" with full preclusive effect on Petitioner's Sarbanes-Oxley (SOX) whistleblower retaliation claim. Such reliance overlooks the core statutory command of 18 U.S.C. § 1514A(e), which unambiguously removes SOX claims from the scope of any predispute arbitration agreement. Indeed, as Judge Collins's dissent underscores, the mere formality of having a district court confirm an arbitral award does not authorize the arbitrator, or, by extension, the parties, to deprive a whistleblower of the judicial resolution mandated by the Sarbanes-Oxley Act.

A. Confirmation Does Not Constitute a Merits Review of SOX Claims.

In routine practice under the Federal Arbitration Act, a court's confirmation of an award is not a de novo review; it is an extremely limited proceeding ensuring the award has no fatal flaws such as fraud or exceeding arbitral powers.

The district court here was not acting as a finder of fact; it neither reviewed the evidence underlying the arbitrator's conclusions nor retried the disputed factual elements that are essential to a SOX claim.

Congress specifically designed 18 U.S.C. § 1514A(e) to prevent such factual questions from being resolved in arbitration in the first place. Whether an award is labeled "confirmed" does nothing to cure the underlying defect: a private arbitral tribunal is barred from determining SOX whistleblower issues.

B. The Majority's Reasoning Misconstrues the Significance of Confirmation of an Arbitration Decision by a District Court.

The panel majority's conclusion turns on the idea that a confirmed arbitration award "has the same force and effect" as any final judgment. *See* 9 U.S.C. § 13; *Hansen,* 122 F.4th 1162. Yet, as Judge Collins points out in the dissent, this uncontroversial principle applies only to awards that could properly be arbitrated in the first place. *Id.*

The *McDonald* and the *Gardner-Denver* line of Supreme Court cases stand for the opposite proposition

in contexts where Congress forbids arbitration of the statutory right at issue. A district court's ministerial act of converting an ineligible arbitral award into a "judgment" does not expand the arbitrator's statutory authority retroactively.

District court confirmation under the FAA is not a process in which the court examines all the relevant facts, hears testimony, or applies the statutory criteria of SOX's whistleblower provisions.

Rather, the court simply recognized the arbitrator's award on those other claims. That recognition cannot vicariously do what Congress expressly forbade, i.e., letting a private tribunal's findings stand in lieu of an actual judicial determination on Petitioner's SOX claim.

C. Section 1514A(e) Explicitly Prohibits Predispute Arbitration of SOX Claims.

Congress was not equivocal: "No predispute arbitration agreement shall be valid or enforceable" for a Sarbanes-Oxley whistleblower dispute. 18 U.S.C. § 1514A(e)(2).

The entire point is to protect the whistleblower's right to a federal judicial forum for matters involving major corporate or securities-related fraud. If such claims could be implicitly resolved by an arbitrator's findings on overlapping issues, and then smuggled back to the district court for a perfunctory confirmation, it would defeat the precise purpose of the statutory prohibition.

As Judge Collins emphasizes, *Pyett* held that when arbitrators are not authorized to resolve the particular

statutory claim at issue, any ensuing award cannot preclude or bar that claim in federal court. The difference between an unconfirmed and confirmed arbitral decision is immaterial if the tribunal lacked statutory authority to dispose of the claim.

D. Policy Considerations Reinforce Congress's Mandate.

Sarbanes-Oxley's whistleblower protections were enacted to encourage employees to report significant corporate or securities violations. Removing these cases from a private arbitral setting is part of ensuring a robust, public airing of wrongdoing.

If a minimal confirmation proceeding can transmute an arbitration panel's factual conclusions into a judicial outcome, then the statutory bar on arbitration for SOX claims is eviscerated. Potential whistleblowers, knowing any related arbitration might inadvertently resolve the same factual issues, would be dissuaded from coming forward.

In short, no amount of confirmation can legitimize an award that exceeds the arbitrator's authority or contravenes explicit congressional directives. The district court's limited review under the FAA does not grapple with the substantive merits of the SOX claim, nor does it somehow grant the arbitrator the power to decide issues that Congress reserved for the federal judiciary. As Judge Collins correctly observed, the statutory text and longstanding precedents foreclose the conclusion that confirmation transforms an otherwise unauthorized arbitral decision into a bar against litigating the SOX whistleblower cause of action.

IV. The Ruling Undercuts the Vital Federal Interest in Robust Whistleblower Protections and Opens the Door to Forum Shopping by Erratically Disparate Outcomes Based on Circumstance.

A. Impedes Effective Oversight of Corporate Misconduct

Sarbanes-Oxley arose from major corporate and accounting scandals (e.g., Enron, WorldCom) that undermined public confidence in financial markets. At its heart is the goal of encouraging employees to come forward with information about financial fraud, securities violations, and other serious wrongdoing, thereby ensuring better oversight of corporate conduct.

By endorsing a framework in which an arbitrator's ruling on related or tangential claims can effectively preclude the statutorily protected SOX claim, the panel's decision chills legitimate whistleblowing. Employees with knowledge of potential fraud will think twice before reporting if they fear that unrelated arbitration findings, on issues never meant to be resolved there, can foreclose their day in court. This outcome directly undermines Congress's determination that whistleblowers should have unrestricted access to a judicial forum.

B. Contrary to Express Congressional Policy and Intent

Sarbanes-Oxley is not merely silent on arbitrability; it explicitly bans any predispute arbitration agreement that compels a SOX whistleblower claim out of federal court. 18 U.S.C. § 1514A(e). Rather than leaving arbitration optional

if mutually agreed, Congress categorically barred it to protect individuals exposing serious wrongdoing.

Letting an arbitral panel decide, or effectively decide through overlapping factual conclusions on related claims, whether the employee engaged in protected activity imposes precisely the condition Congress sought to prohibit. The whistleblower thus finds key elements of the SOX claim resolved behind closed doors, never subjected to a proper judicial assessment under the statutory framework. Such a result is anathema to § 1514A(e)'s text and purpose.

The Supreme Court has consistently recognized that protecting whistleblowers is crucial to uncovering large-scale corporate or securities fraud. If lower courts can use an arbitrator's tangential findings to block a claim that Congress insisted be heard in federal court, public trust in the regulatory and legal system erodes. Corporations may leverage arbitration clauses to sidestep comprehensive judicial scrutiny, which is precisely what SOX was designed to prevent.

C. Departure From Supreme Court Precedent and the Risk of Forum Shopping Undermine the Public Interest

By ruling as it did, the Ninth Circuit's decision departs from the narrowly drawn Supreme Court precedents (e.g., *Alexander v. Gardner-Denver Co.* and *McDonald v. City of West Branch*) that protect statutory claims Congress has expressly removed from the arbitration sphere. Rather than honor those rulings' admonitions against using arbitral findings to extinguish non-arbitrable rights,

the majority decision fosters a result contrary to that Supreme Court guidance.

If a party can exploit this precedent to steer tangential claims into arbitration, knowing that any adverse factual findings might be confirmed and then wielded as a weapon of preclusion, unscrupulous litigants could effectively game the system. This invites a race to arbitrate on collateral issues and then argue that the whistleblower's SOX claim is precluded, despite Congress's absolute prohibition.

Sarbanes-Oxley was enacted in the wake of corporate scandals that shook public confidence in the integrity of financial and securities markets. The statute's whistleblower protections are intended to encourage employees to expose wrongdoing. Allowing a de facto end-run around that protection by using collateral arbitration determinations, under the guise of confirmation, thus strikes at the heart of Congress's will and disserves the public interest in transparent corporate governance.

These troubling consequences, i.e. the nullification of a critical statutory protection, the open invitation to forum shop against SOX whistleblowers, and the departure from Supreme Court precedent, render this issue fit for the Supreme Court's immediate review. The decision below, if left standing, will discourage whistleblowers and threaten the comprehensive oversight regime Congress sought to impose through Sarbanes-Oxley.

CONCLUSION

For the foregoing reasons—and particularly for those set forth in Judge Collins's well-reasoned dissent—this Court should grant the petition for a writ of certiorari, reverse the judgment below as it pertains to the Sarbanes-Oxley whistleblower claim, and remand for further proceedings consistent with Congress's explicit prohibition on the mandatory arbitration of such claims.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15296

KARL HANSEN,

Plaintiff-Appellant,

v.

ELON MUSK; TESLA MOTORS, INC.; U.S. SECURITIES ASSOCIATES, INC.,

Defendants-Appellees.

Argued and Submitted May 14, 2024
Pasadena, California

Filed December 10, 2024

Appeal from the United States District Court for the District of Nevada; D.C. No. 3:19-cv-00413-LRH-CSD, Larry R. Hicks, District Judge, Presiding

Before: Daniel P. Collins, Holly A. Thomas, and Anthony D. Johnstone, Circuit Judges.

Opinion by Judge H.A. Thomas; Partial Concurrence and Partial Dissent by Judge Collins

Appendix A

OPINION

H.A. THOMAS, Circuit Judge.

The plain language of the Sarbanes-Oxley Act of 2002 (SOX) prevents SOX claims from being subject to mandatory predispute arbitration agreements. 18 U.S.C. § 1514A(e). This case raises the question whether a federal-court order confirming an arbitrator's decision can nevertheless have a preclusive effect in a SOX suit filed in federal court.

We hold that, although an arbitrator's decision can never preclude a SOX claim, a confirmed arbitral award can sometimes preclude relitigation of the issues underlying such a claim. And, in this case, we hold that relitigation of the dispositive issues underlying Karl Hansen's SOX claim is precluded by a confirmed arbitral award that also conclusively resolves Hansen's other claims. We therefore affirm the district court's order dismissing Hansen's complaint.

I.

A.

On July 19, 2019, Karl Hansen brought this lawsuit claiming that Tesla, Inc., Tesla's CEO Elon Musk, and U.S. Security Associates (USSA) (collectively, Defendants) retaliated against him for reporting misconduct at Tesla to Tesla's management and the Securities and Exchange

Commission (SEC).[1] As alleged in Hansen's complaint, Hansen was hired as a protection associate by Tesla in March 2018, and in subsequent months was assigned to work as an investigations case specialist at Tesla's Nevada Gigafactory. While in those roles, Hansen investigated what he believed to be thefts at the Gigafactory costing Tesla tens of millions of dollars, as well as narcotics trafficking at the Gigafactory conducted in connection with Mexican drug cartels. Hansen also investigated contracts that he believed senior management at Tesla had improperly awarded. And he expressed concerns over the monitoring of employee communications by Tesla's Senior Manager of Global Security, including wiretapping and hacking. Hansen reported the findings of his investigations to Tesla's management. His reporting eventually reached Musk.

In June 2018, Tesla terminated Hansen's employment, citing internal restructuring. Hansen accepted an offer to work at USSA, with which Tesla contracted to provide security services. Hansen continued his investigations of alleged thefts and ties to criminal organizations at Tesla. He requested coordination with local, state, and federal law enforcement due to what he saw as the complexities of the case and informed his supervisors about a possible cover-up by senior management. On August 9, 2018, Hansen also filed an SEC report about Tesla's alleged misconduct.

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1. Although Hansen's complaint also names Tesla Motors, Inc. as a defendant, he does not bring any claims against that entity.

On August 30, 2018, Musk saw Hansen stationed at an entrance to the Gigafactory and demanded that he be removed from his post. USSA subsequently told Hansen that his position at the Gigafactory had been eliminated and that he would be trained for a different position unrelated to Tesla. Hansen alleges that he was removed in retaliation for reporting misconduct at Tesla to his supervisors and the SEC.

B.

After Hansen filed his complaint, Defendants filed motions to compel arbitration of most claims on the ground that Hansen's employment agreement with USSA contained a provision mandating arbitration of disputes arising out of his assignment at Tesla. Defendants, however, did not move to compel arbitration of Hansen's SOX claim, which federal law states may not be subject to any "predispute arbitration agreement." 18 U.S.C. § 1514A(e)(2).

The district court granted the motions, ordering most of Hansen's claims to arbitration. *Hansen v. Musk,* No. 19-cv-00413, 2020 WL 4004800, at *3-4 (D. Nev. July 25, 2020). The district court stayed proceedings with respect to Hansen's SOX claim, finding that it "ar[o]se from the same conduct" as his other claims. *Id.* at *8.

C.

Before the arbitrator, Hansen brought multiple new claims, including claims for violations of the federal and

Nevada Racketeer Influenced and Corrupt Organizations (RICO) Acts, and violation of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank) protections for whistleblowers. The arbitrator disposed of Hansen's RICO claims in two interim awards, holding that Hansen had failed to adequately allege either a pattern of racketeering activity or a cognizable injury. The arbitrator granted summary judgment to Defendants on Hansen's claim for breach of contract and one of his claims for tortious interference with his contractual relationship with USSA, finding that Hansen had no contractual right to continue working at the Gigafactory.

The arbitrator issued a final award on June 8, 2022, rejecting Hansen's remaining claim of tortious interference with contract and his claim of retaliation under Dodd-Frank. The arbitrator found the tortious interference claim failed because Hansen had no contractual right to be assigned to work at the Gigafactory. As to the Dodd-Frank claim, the arbitrator explained that Hansen had been transferred from Tesla to USSA because Tesla outsourced the work of all employees with Hansen's job position to USSA. And the arbitrator found that Hansen's position at the Gigafactory had not been terminated because of his complaint to the SEC, but rather because Hansen had emailed significant amounts of confidential information to third parties, and then attempted to cover his tracks by deleting the emails from his "sent" folder. The arbitrator also found that USSA could not have retaliated against Hansen for any protected activity because USSA had never been made aware of the activity that Hansen claimed was protected.

Explaining that, to be entitled to Dodd-Frank's whistleblower protections, Hansen must further prove that a reasonable person would have believed that the activities he reported violated securities laws, the arbitrator concluded that Hansen could not have reasonably held such a belief. The arbitrator explained that Hansen's complaints referenced only "[g]arden variety theft and drug violations[,] . . . matters governed by state and local law, not Dodd-Frank." The arbitrator noted that Hansen had not provided any argument to the contrary, and that Hansen had indeed testified that he was not even aware of what was reported to Tesla's shareholders or included in its financial statements.

D.

After the arbitrator's decision, Defendants filed a motion before the district court to lift the stay of proceedings, including the stay of the SOX claim, and to confirm the arbitration award. Hansen did not oppose the motion, which the district court granted on July 25, 2022. Defendants then filed motions to dismiss the entire suit, arguing that the arbitrator's findings precluded Hansen from relitigating the questions whether he engaged in protected activity, whether USSA knew about any protected activity, and whether USSA took adverse action against Hansen on the basis of protected activity—issues that were also key to Hansen's SOX claim.

The district court granted Defendants' motions and dismissed the case. The district court first cited our decision in *Clark v. Bear Stearns & Co.,* 966 F.2d 1318 (9th Cir. 1992), for the proposition that an arbitral award

can have a preclusive effect on securities law claims, such as Hansen's SOX claim. The district court then held that Hansen could not relitigate whether he had engaged in protected activity in pursuing his SOX claim because the arbitrator had found that Hansen had not engaged in any protected activity at all, and Hansen had a full and fair opportunity to litigate that issue. The district court emphasized the arbitrator's finding that Hansen could not have reasonably believed the subject of his complaint was related to any violation of securities laws. And the district court noted that Hansen did not claim to blow the whistle regarding any other kind of fraud covered by SOX. The district court therefore dismissed Hansen's SOX claim with prejudice. This appeal followed.

II.

We have jurisdiction under 28 U.S.C. § 1291. "We review dismissals for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) de novo and may affirm on any ground supported by the record." *Saloojas, Inc. v. Aetna Health of Cal., Inc.,* 80 F.4th 1011, 1014 (9th Cir. 2023). "We also review de novo whether issue preclusion is available," and if it is, we review for abuse of discretion "the district court's decision to apply the doctrine." *SEC v. Stein,* 906 F.3d 823, 828 (9th Cir. 2018).

III.

A.

In general, a "federal-court order confirming an arbitration award has 'the same force and effect' as a

final judgment on the merits, 9 U.S.C. § 13, including the same preclusive effect."[2] *NTCH-WA, Inc. v. ZTE Corp.,* 921 F.3d 1175, 1180 (9th Cir. 2019). Claims brought under SOX's anti-retaliation provision, however, may not be committed to arbitration by a "predispute arbitration agreement." 18 U.S.C. § 1514A(e). Hansen argues that giving preclusive effect to the arbitrator's decision as to the issues underlying his SOX claim would violate this statutory command, because doing so would mean that his SOX claim was effectively resolved in arbitration proceedings. We disagree.

1.

The Supreme Court has made clear that arbitration proceedings generally provide a suitable forum for the adjudication of federal claims. *See 14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 265-72 (2009). But the Court has not always taken this view. In *McDonald v. City of West Branch,* the Supreme Court held that an unappealed arbitration award could not preclude a plaintiff from bringing a civil rights claim in federal court under 42 U.S.C. § 1983. 466 U.S. 284, 292 (1984). The Supreme Court explained in *McDonald* that in certain proceedings, "an arbitration proceeding cannot provide an adequate substitute for a judicial trial" because arbitrators may

2. Because this case concerns the preclusive effect of an arbitral award confirmed by a federal court exercising federal question jurisdiction and because it concerns federal statutory claims, we apply federal law to determine the preclusive effect of the award. *See Hawkins v. Risley,* 984 F.2d 321, 324-25 (9th Cir. 1993).

not always have the experience or authority to consider Section 1983 claims, plaintiffs may not be adequately represented during arbitration proceedings, and arbitral factfinding procedures may not be adequate to protect plaintiffs' federal rights. 466 U.S. at 290-92.

In *Dean Witter Reynolds, Inc. v. Byrd,* however, the Supreme Court took a step in another direction, suggesting that arbitration awards may sometimes be able to preclude federal claims, even when those claims could not themselves be resolved in arbitration. 470 U.S. 213, 222 (1985). Before *Byrd* was decided, some federal courts had held that arbitrable and nonarbitrable claims needed to be considered together in federal court, because otherwise the arbitration of the arbitrable claims might preclude the adjudication of the nonarbitrable claims. *Id.* at 222. The Supreme Court held in *Byrd,* however, that federal district courts could split such claims up, sending the arbitrable claims to arbitration and adjudicating the nonarbitrable claims themselves. *Id.* at 221-24. As to the possibility that doing so might have a preclusive effect on litigation concerning nonarbitrable claims, the Court, citing *McDonald* as an example, noted that federal courts had tools to deal with this: namely, by determining what preclusive effect should be given to arbitration proceedings.[3] *Id.* at 223.

Following *Byrd,* federal courts of appeals held that arbitral awards could have a preclusive effect

3. *Byrd* nevertheless explicitly declined to decide whether such preclusion was permissible. *Id.* at 223.

over nonarbitrable claims, but that this effect must be determined on a case-by-case basis. In *Greenblatt v. Drexel Burnham Lambert, Inc.,* for example, the Eleventh Circuit held that an arbitration award precluded the plaintiff from asserting certain predicate acts in a subsequent RICO claim. 763 F.2d 1352, 1359 (11th Cir. 1985). Noting that some courts had found RICO claims to be nonarbitrable, the Eleventh Circuit nevertheless held that the application of issue preclusion was appropriate in that case because the arbitration procedures employed "adequately protected the rights of the parties." *Id.* at 1361. Our court, in turn, cited *Greenblatt*'s reasoning with approval in *C.D. Anderson & Co. v. Lemos,* 832 F.2d 1097 (9th Cir. 1987). There, we held that a plaintiff could not relitigate securities claims in federal court that had already been resolved in arbitration.[4] *Id.* at 1099-1100. Then, in our 1992 decision in *Clark,* we held that "[a]n arbitration decision can have res judicata or collateral estoppel effect even if the underlying claim involves the federal securities laws." 966 F.2d at 1321 (citing *C.D. Anderson & Co.,* 832, F.2d at 1100).

Although our decisions in *C.D. Anderson & Co.* and *Clark* indicate that nonarbitrable securities claims may be subject to preclusion from arbitral awards, those decisions did not directly address the question this case presents.

4. Before the Supreme Court's 1987 decision in *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987), we had held that Exchange Act claims could not be subject to arbitration. *Id.* at 225 n.1. In *C.D. Anderson & Co.,* we declined to reach whether *Shearson* had a retroactive effect because the parties had voluntarily submitted their case to arbitration and our holding was consistent with *Shearson.* 832 F.2d at 1099.

In *C.D. Anderson & Co.*, we considered only whether an arbitral award resolving a claim could preclude litigation of the same claim in federal court. 832 F.2d at 1099-1100. And in *Clark*, we considered the preclusive effect of an arbitral award on a claim made non-arbitrable by contract. 966 F.2d at 1321 n.2. We therefore did not consider in those cases whether a confirmed arbitration award resolving an arbitrable claim could preclude a separate claim made nonarbitrable by statute.

2.

Hansen invokes the Supreme Court's decision in *Byrd* to argue that the arbitrator's resolution of his Dodd-Frank claim should not have any preclusive effect over his nonarbitrable SOX claim. Specifically, he references the Court's statement in that case that the preclusive effect of arbitration proceedings on nonarbitrable claims was "far from certain." *Byrd*, 470 U.S. at 222. But as the history recounted above makes clear, Hansen's reliance on that decision is misplaced. *Byrd* specifically left open the question whether arbitration proceedings could have a preclusive effect on nonarbitrable claims. *Id.* at 223. And, just as *Byrd* "foreshadowed" our conclusions in *C.D. Anderson & Co.* and *Clark*, so too did those decisions foreshadow the conclusion we reach today. *Clark*, 966 F.2d at 1321.

3.

It is true, as Hansen argues, that Congress has directed that SOX claims may not themselves be compelled

to binding arbitration under a predispute agreement. 18 U.S.C. § 1514A(e)(2). But that declaration does not serve as a bar to the arbitrator's resolution of issues that may, as in this case, bear directly on the merits of a SOX claim. Nor does it prevent that resolution from having a preclusive effect.

The Supreme Court has "ma[d]e clear that issue preclusion is not limited to those situations in which the same issue is before two *courts." B & B Hardware, Inc. v. Hargis Indus., Inc.,* 575 U.S. 138, 148 (2015). Agencies, for example, may be unable to adjudicate certain federal claims or lack certain procedural protections—such as the right to a jury trial—guaranteed in federal court. *See id.* at 150 (considering an argument that granting preclusive effect to a federal agency decision could potentially violate the jury trial right). But the Supreme Court has nevertheless held as a matter of common law that an agency's resolution of issues properly before it can have a preclusive effect. *Id.*; *see also United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.").

Indeed, this holding has been applied to confer preclusive effect over state agency proceedings, even though the applicable statute requiring that federal courts give "full faith and credit" to state proceedings does not mention state agencies. 28 U.S.C. § 1738; *see also*

Jamgotchian v. Ferraro, 93 F.4th 1150, 1154 (9th Cir. 2024) (explaining that although 28 U.S.C. § 1738 "does not apply to state administrative agency decisions . . . the Supreme Court has held that, as a matter of federal common law, federal courts must sometimes accord preclusive effect to state agency decisions" (citation omitted)). We thus explained in *Guild Wineries & Distilleries v. Whitehall Co.,* that the decisions of state agencies may have a preclusive effect "so long as the state proceeding satisfies the requirements of fairness outlined" by the Supreme Court.[5] 853 F.2d 755, 758 (9th Cir. 1988) (citing *Utah Constr.,* 384 U.S. at 422).

Here, by contrast, we need not rely on the common law. The Federal Arbitration Act contains an express statutory command that a federal-court judgment confirming an arbitrator's decision be given "'the same force and effect'" as any other judgment from a federal court, "including the same preclusive effect." *NTCH-WA, Inc.,* 921 F.3d at 1180 (quoting 9 U.S.C. § 13). And although 18 U.S.C. § 1514A(e) states that SOX claims may not themselves be subject to predispute arbitration agreements, nothing in the statute clearly limits the issue-preclusive force of a confirmed arbitral award's resolution of issues within the arbitrator's

5. Strengthening the analogy between arbitral and administrative proceedings, we also apply the *Utah Construction* factors to determine "whether an arbitration was sufficiently adjudicatory in nature" to have a preclusive effect in a federal court case. *Jacobs v. CBS Broad., Inc.,* 291 F.3d 1173, 1178 (9th Cir. 2002) (relying on California Supreme Court precedent that applied the *Utah Construction* factors). Here, however, no party has argued that the arbitration proceedings were insufficiently adjudicatory under *Utah Construction.*

jurisdiction. *Cf. Howard v. City of Coos Bay,* 871 F.3d 1032, 1040-44 (9th Cir. 2017) (finding that, even though a prior judgment could not have addressed the plaintiff's present claim, issue preclusion applied because it "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim" (quoting *Taylor v. Sturgell,* 553 U.S. 880, 892 (2008))).

Absent a "clear and manifest" expression of congressional intent, we will not presume that another statute has displaced the Federal Arbitration Act's requirements. *See Epic Sys. Corp. v. Lewis,* 584 U.S. 497, 510 (2018) (quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974)). We therefore see no reason to exempt SOX claims from the preclusive effect afforded to confirmed arbitral awards.[6]

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6. The dissent would hold that *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), and its progeny compel us to read such a limitation into SOX. That line of cases held that arbitration awards can have no preclusive effect in subsequent statutory actions if the "arbitrators were not authorized to resolve such claims." *Pyett,* 556 U.S. at 264. But those cases concerned only unconfirmed arbitration awards. *See Gardner-Denver,* 415 U.S. at 42-43; *Barrentine v. Arkansas-Best Freight Sys., Inc.* 450 U.S. 728, 730-731 (1981); *McDonald,* 466 U.S. at 286. "[T]he considerations that motivated the Supreme Court to deny preclusive effect to unreviewed arbitration decisions are not present in a case like the one before us, which involves a reviewed arbitration decision." *Caldeira v. County of Kauai,* 866 F.2d 1175, 1178 (9th Cir. 1989). And treating confirmed and unconfirmed arbitral awards equally would ignore the FAA's command that confirmed awards "shall have the same force and effect" as a judgment. 9 U.S.C. § 13.

4.

Contrary to Hansen's argument, our holding does not circumvent the statutory restriction on the arbitration of SOX claims. 18 U.S.C. § 1514A(e)(2). That restriction still has force. First, because "the plaintiff is 'the master of the complaint,'" she may always avoid a preclusive arbitral award by declining to plead arbitrable claims along with a SOX claim, where the arbitration might resolve issues necessary for a SOX claim's success. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.,* 535 U.S. 826, 831 (2002) (quoting *Caterpillar Inc. v. Williams,* 482 U.S. 386, 398-99 (1987)). Indeed, Hansen himself initially took this route. His complaint before the federal district court did not allege a Dodd-Frank claim, which Hansen raised for the first time before the arbitrator.

Second, as the Supreme Court explained in *Byrd,* courts can continue to apply conventional "preclusion doctrine" to "directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding." 470 U.S. at 223. For example, courts must insist that arbitration proceedings provide a "full and fair opportunity to litigate" the preclusive issue, and that "the issue was actually litigated and decided" in the arbitration proceedings. *Howard,* 871 F.3d at 1041 (quoting *Oyeniran v. Holder,* 672 F.3d 800, 806 (9th Cir. 2012)); *Clark,* 966 F.2d at 1322-23 (declining to confer preclusive effect on an arbitral award because the record was insufficient "to pinpoint the exact issues previously determined"). Both plaintiffs and courts therefore retain tools to protect the statutory right to federal adjudication of SOX claims.

B.

Traditional preclusion doctrine holds that an issue resolved by a prior proceeding is precluded from relitigation if "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Howard,* 871 F.3d at 1041 (quoting *Oyeniran,* 672 F.3d at 806). The Supreme Court's decision in *McDonald,* 466 U.S. at 290-91, and the Eleventh Circuit's decision in *Greenblatt,* 763 F.2d at 1361, however, suggest that "at least with respect to an important, nonarbitrable federal claim," courts should be "hesitant to preclude the litigation of [a] federal claim based on the [issue preclusive] effects of a prior arbitration award." *Greenblatt,* 763 F.2d at 1361. These decisions instead indicate that courts should consider additional factors beyond those contemplated by conventional preclusion doctrine, including "the federal interests in insuring a federal court determination of the federal claim," the "expertise of the arbitrator," and "the procedural adequacy of the arbitration proceeding." *Id.*; *McDonald,* 466 U.S. at 290-91. Based on these decisions, Hansen urges us to take a "case-by-case approach to determining the [issue preclusive] effects of arbitration." *Greenblatt,* 763 F.2d at 1361. But we need not decide whether to do so here. Regardless of whether there are ever circumstances—beyond those contemplated by conventional preclusion doctrine—under which courts may decline to confer a preclusive effect on an arbitral award, such circumstances are not present in this case.

Unlike the factors the Court found controlling in *McDonald,* for example, Hansen points to no deficiency in the arbitrator's experience or expertise in adjudicating federal statutory claims. *Cf. McDonald,* 466 U.S. at 290-91. Nor can he, given the Supreme Court's holding in *Shearson,* 482 U.S. at 227-39, point to a general rule limiting the arbitrator's ability to consider federal securities law claims. Quite to the contrary, the arbitrator considered and resolved Hansen's Dodd-Frank claim—a securities law claim which, as we will further explain, has similar elements to Hansen's SOX claim.

Hansen also does not identify any deficiencies in the arbitration procedures themselves. Hansen and Defendants were represented by counsel and able to present relevant evidence. *Cf. Greenblatt,* 763 F.2d at 1361. Hansen therefore provides no legal or prudential reason to deny preclusive effect to the arbitrator's decision.

IV.

Hansen argues that even if a confirmed arbitral decision can preclude relitigating issues in the litigation of a subsequent, nonarbitrable claim, the arbitrator's findings in this case do not have issue preclusive effect on his present claim under SOX. We again disagree.

"Issue preclusion, or collateral estoppel, 'bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Howard,* 871 F.3d at 1040-41 (quoting *Taylor,* 553 U.S. at 892). For issue preclusion

to apply, the party seeking preclusion must show "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Id.* at 1041 (quoting *Oyeniran,* 672 F.3d at 806).

The district court correctly held that key aspects of Hansen's SOX claim were precluded by the arbitrator's findings resolving his Dodd-Frank claim. Dodd-Frank prohibits an employer from taking an adverse employment action or discriminating against a "whistleblower" because of "any lawful act" the whistleblower performs "(i) in providing information to the [SEC] . . . ; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information; or (iii) in making disclosures that are required or protected under" SOX or other securities laws. 15 U.S.C. § 78u-6(h)(1)(A). The law defines a "whistleblower" as a person or group who "provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]." *Id.* § 78u-6(a)(6). To receive protection from retaliation, under the regulation in effect at the time Hansen contacted the SEC, the whistleblower must "possess a reasonable belief that the information . . . provid[ed] relates to a possible securities law violation." *Digit. Realty Tr., Inc. v. Somers,* 583 U.S. 149, 158 (2018) (quoting 17 C.F.R. § 240.21F-2(b)(1)(i) (2011)).[7]

7. The current version of the regulation contains a similar requirement that a whistleblower "must reasonably believe that the information . . . provide[d] . . . relates to a possible violation of the federal securities laws." 17 C.F.R. § 240.21F-2(d)(1)(ii) (2020).

SOX provides different, although related, protections. It protects employees of public companies from retaliation for providing information to a supervisor, federal agency, or Congress. 18 U.S.C. § 1514A(a). To obtain the statute's anti-retaliation protections, the employee must "report what they reasonably believe to be instances of criminal fraud or securities law violations." *Murray v. UBS Sec., LLC,* 601 U.S. 23, 27 (2024). But while "Dodd-Frank's whistleblower provision . . . focuses primarily on reporting to federal authorities," SOX's "protections include employees who provide information to any 'person with supervisory authority over the employee.'" *Lawson v. FMR LLC,* 571 U.S. 429, 456 (2014) (quoting 18 U.S.C. § 1514A(a)(1)(C)).

In this case, the arbitrator found that Hansen could not have reasonably believed that the subject of his complaint to the SEC related to any violation of securities laws. This element is common to both Dodd-Frank and SOX claims, and Hansen points to no difference in the merits of what an arbitrator or court must find to resolve that element.

Hansen does not point to any other difference that would militate against issue preclusion. Hansen does not argue, for example, that the issue was not "actually litigated and decided" or that it was not "necessary to decide the merits" of his Dodd-Frank claim. *Howard,* 871 F.3d at 1041 (quoting *Oyeniran,* 672 F.3d at 806). Nor could he. First, the arbitrator agreed with Tesla that Hansen had no reasonable belief that the conduct he investigated related to a violation of the securities laws. This is

sufficient to satisfy the "actually litigated" requirement, which requires only that the issue be "raised, contested, . . . submitted for determination[,] and . . . determined." *Janjua v. Neufeld*, 933 F.3d 1061, 1066 (9th Cir. 2019) (quoting Restatement (Second) of Judgments § 27, cmt. (d) (1982)). And this finding was "necessary" to the arbitrator's resolution of Hansen's Dodd-Frank claim on the merits, as it disposed of a key element of that claim. *See id.* (explaining that even implicitly resolved issues satisfy this factor if "necessary to the ultimate determination").

Although Hansen argues that he did not have a full and fair opportunity to specifically litigate his SOX claim before the arbitrator, he mistakes the nature of issue preclusion. The point of the doctrine is to bar the relitigation of an issue already litigated and resolved "even if the issue recurs in the context of a different claim." *See Howard*, 871 F.3d at 1041 (quoting *Taylor*, 553 U.S. at 892). And Hansen, as just discussed, did litigate the issue. Nor can Hansen show that he lacked a full or fair opportunity to do so, because he identifies no deficiencies in the procedures employed during the arbitration or in the parties' incentives to fully air the issue out. *See Maciel v. Comm'r*, 489 F.3d 1018, 1023 (9th Cir. 2007) (explaining the factors used to determine whether a party had a full and fair opportunity to litigate an issue). It was thus appropriate for the district court to apply issue preclusion principles in dismissing this case.[8]

8. Of course, SOX also prohibits retaliation against employees who report other forms of federal criminal fraud (including bank fraud, wire fraud, mail fraud, commodities fraud, and "fraud against shareholders"). 18 U.S.C. § 1514A(a)(1). But Hansen

Hansen nevertheless argues that the arbitrator's rejection of his Dodd-Frank claim cannot preclude his SOX claim because SOX claims rely on a burden-shifting framework to assess the employer's retaliatory intent. Under this framework, the plaintiff must first make out a prima facie case of retaliation before the burden shifts to the defendant to show "'by clear and convincing evidence' that it 'would have taken the same unfavorable personnel action in the absence of' the protected activity." *Murray,* 601 U.S. at 27-28 (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)).

We need not elaborate on how (or even if) the burden-shifting framework for determining a defendant's retaliatory intent under SOX differs from the framework for determining a defendant's intent under Dodd-Frank. Hansen's claim fails regardless of Defendants' intent. To make out a prima facie claim under SOX, Hansen must allege an "objectively reasonable" belief that his complaint to the SEC reported a violation of federal securities or fraud law. *Van Asdale,* 577 F.3d at 1000. But the arbitrator found that Hansen did not have this objectively reasonable belief. Even if a burden-shifting framework applies only to SOX claims, the burden therefore would not shift.

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makes no specific argument that he reported any such fraud, and his complaint contains only a conclusory allegation that Defendants committed non-securities fraud. These allegations are not enough to sustain his claim. *See Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 1001 (9th Cir. 2009) (explaining that, to demonstrate an objectively reasonable belief of shareholder fraud, "the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud" (quoting *Day v. Staples, Inc.,* 555 F.3d 42, 55 (1st Cir. 2009))).

V.

Finally, Hansen argues that the arbitrator's decision should not have prevented him from raising his state law claims in federal court, because the arbitrator's dismissal of those claims merely precluded him from raising them again in the same forum.[9] Hansen suggests that it is an issue of first impression "whether dismissal of claims by an arbitrator constitutes a determination on the merits" with a preclusive effect. But on the contrary, and as we have already discussed, it is well established that a "federal-court order confirming an arbitration award has 'the same force and effect' as a final judgment on the merits, 9 U.S.C. § 13, including the same preclusive effect." *NTCH-WA, Inc.,* 921 F.3d at 1180.

The case law that Hansen cites in support of his argument is inapposite. In each of these cases, the court found only that dismissal of a claim on purely procedural grounds did not prevent the plaintiff from reasserting the claim in another forum. *See Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 499, 509 (2001) (holding that a failure to comply with California's statute of limitations did not bar the claim from being raised again in Maryland court under Maryland law, which had a longer statute of limitations); *Post, LLC v. Berkshire Hathaway Specialty Ins. Co.,* No. 20-cv-2972, 2022 WL 3139022, at *1 (D.D.C.

9. As we held in *NTCH-WA, Inc.,* state preclusion law determines the preclusive effect of federal-court orders confirming arbitration awards when the federal court is sitting in diversity. 921 F.3d at 1180-81. Hansen, however, raises no argument under Nevada law nor does he argue that it differs from federal law on this issue.

Aug. 5, 2022) (holding that an arbitrator's dismissal for "nonpayment of fees" did not give rise to a "claim-preclusive effect in related litigation").

A decision that "passes directly on the substance of a particular claim," however, may preclude subsequent litigation. *Semtek Int'l Inc.,* 531 U.S. at 501-02 (cleaned up). Here, the arbitrator addressed the substance of Hansen's state law claims by finding that Hansen had failed to establish necessary elements of those claims. Those decisions were subsequently confirmed by the district court without opposition and are entitled to preclusive effect.

VI.

The arbitrator's decision precluded each of the claims that Hansen raised before the district court. We therefore AFFIRM the judgment of the district court dismissing those claims.

COLLINS, Circuit Judge, concurring in the judgment in part and dissenting in part:

In the proceedings below, Plaintiff Karl Hansen asserted a variety of claims against Defendants Elon Musk; Tesla Motors, Inc.; and U.S. Security Associates, Inc. The district court compelled arbitration of all of the claims except for Hansen's claim against Defendants under the whistleblower retaliation provision of the Sarbanes-Oxley Act. *See* 18 U.S.C. § 1514A. The latter claim was not submitted to arbitration because § 1514A(e) expressly states that 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," and that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." *Id.* § 1514A(e). After the arbitration was concluded, Defendants sought confirmation of the arbitral award, which had rejected all of the claims submitted to the arbitrator (which included some additional claims that were asserted by Hansen in the arbitration and had not been raised in Hansen's original complaint). Hansen did not oppose confirmation, and the district court confirmed the award and adopted it as a "final, enforceable judgment." Defendants subsequently moved to dismiss the remaining Sarbanes-Oxley claim as barred by the issue-preclusive effect of the arbitral award, and the district court granted that motion. Hansen has appealed the resulting dismissal of his claims, and I would affirm in part, reverse in part, and remand.

Appendix A

I

For the first time on appeal, Hansen argues that the district court committed plain error in rejecting, based on the adverse arbitral award, several of the claims he asserted before the arbitrator. Hansen's arguments on this score are frivolous. Hansen asserts that the arbitrator's pre-hearing dismissal of several state-law claims was not "on the merits," but that contention is flatly belied by the arbitrator's decisions. The arbitrator expressly dismissed these claims, in advance of the arbitral evidentiary hearing, because it was apparent either at the pleading stage or at summary judgment that Hansen could not satisfy one or more essential elements of these claims. The resulting judgment confirming the award was therefore an adverse final judgment on the merits of those claims, and Hansen is fully bound by that judgment. I therefore concur in the judgment to the extent that the majority affirms the district court's rejection of all of Hansen's claims *other* than his Sarbanes-Oxley retaliation claim.

II

In my view, however, the district court erred in holding that, despite the statutory prohibition on arbitration of Sarbanes-Oxley whistleblower retaliation claims, *see* 18 U.S.C. § 1514A(e), the arbitral award collaterally estopped Hansen from litigating his Sarbanes-Oxley retaliation claim in the district court. I therefore dissent from the majority's decision affirming the district court on this point.

Appendix A

A

In concluding that the arbitration award against Hansen may be given preclusive effect vis-à-vis his Sarbanes-Oxley retaliation claim, the majority places dispositive reliance on § 13 of the Federal Arbitration Act ("FAA"), which states in relevant part that a judgment confirming an arbitration award "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13. According to the majority, invoking § 1514A(e) to decline giving preclusive effect to the confirmed arbitration award here would improperly "displace[]" FAA § 13's requirements without the "'clear and manifest' expression of congressional intent" necessary to support such an asserted repeal by implication. *See* Opin. at 1171 (citing *Epic Sys. Corp. v. Lewis,* 584 U.S. 497, 510 (2018)). But the canon invoked in *Epic Systems* rests on the premise that the "two statutes" in question "*cannot be harmonized.*" 584 U.S. at 510 (emphasis added). Here, the conflict posited by the majority between the statutes is illusory, because the majority's reliance on § 13 is ultimately question begging. We have said that federal common law governs the preclusive effect, under FAA § 13, of a federal court judgment confirming an arbitration award, *see NTCH-WA, Inc. v. ZTE Corp.,* 921 F.3d 1175, 1180 (9th Cir. 2019), and the question presented here is whether, *as a matter of federal common law,* preclusive effect should be denied in this specific context in light of the general

nonarbitrability of Sarbanes-Oxley retaliation claims.[1] Whichever way that federal common law issue under § 13 is properly resolved, there will be no resulting conflict between the two statutes.

B

I turn, then, to whether, under the applicable federal common law preclusion principles, preclusive effect should not be given to the confirmed arbitral award in light of § 1514A(e). In applying the federal common law of preclusion, the federal courts have generally followed the principles set forth in the Restatement of Judgments.

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1. The majority suggests that, because federal common law would incorporate state common law in cases in which the district court is exercising diversity jurisdiction, *see NTCH-WA,* 921 F.3d at 1180, Nevada preclusion law would presumably apply here. *See* Opin. at 1175 n.9. But the district court was not exercising diversity jurisdiction when it confirmed the arbitral award. Rather, the district court had federal-question jurisdiction over Hansen's still-pending Sarbanes-Oxley claim, *see* 28 U.S.C. § 1331, and supplemental jurisdiction over any related non-federal claims, *id.* § 1367(a). Accordingly, the preclusive effect of the federal judgment confirming the arbitral award here is governed by federal common law. *Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 507 (2001); *see also* 18B Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice & Procedure § 4472, at p.358 (3d ed. 2019). And even if state law were borrowed as the rule of decision, that borrowing would be limited by the principle that any "federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests." *Semtek,* 531 U.S. at 509. For the reasons I will explain, here there is a "federal interest[ ]" that is incompatible with the application of issue preclusion.

See B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015). Under § 84 of the Restatement, issue preclusion will not be afforded to a "determination of an issue in arbitration" if, *inter alia,* doing so "would be incompatible with *a legal policy* . . . that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question." RESTATEMENT (SECOND) OF JUDGMENTS § 84(3)(a) (emphasis added). According to comment (g) to § 84, this exception recognizes that the "conclusive effect of an arbitration award is subordinate" to any "statutory provisions for alternative or supplementary procedures" governing a dispute. *Id.* § 84 cmt. g. The Reporter's Note to § 84 further states that comment (g) is based on *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), which held that, under the circumstances of that case, an arbitral decision against an employee challenging his termination under a collective bargaining agreement could not be given preclusive effect so as to bar a subsequent racial discrimination suit under Title VII of the Civil Rights Act of 1964. *Id.* at 47-54.

In a line of subsequent cases, the Supreme Court has explored the contours of the exception to arbitral preclusion recognized in *Gardner-Denver.* In *McDonald v. City of West Branch,* 466 U.S. 284 (1984), the Supreme Court noted that, similar to *Gardner-Denver,* the Court in *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981), had held that an adverse arbitration decision concerning employees' wage claims did not "preclude[] a subsequent suit based on the same underlying facts alleging a violation of the minimum wage

provisions of the Fair Labor Standards Act." *McDonald*, 466 U.S. at 289. *McDonald* construed *Barrentine* and *Gardner-Denver* as being "based in large part on [the Court's] conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes." *Id.* Applying that principle, the Court in *McDonald* reached the same conclusion with respect to an action under 42 U.S.C. § 1983, holding that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." *Id.* at 290.

More recently, the Court has underscored "the narrow scope of the legal rule arising from th[e] trilogy of decisions" in *Gardner-Denver*, *Barrentine*, and *McDonald*. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 263 (2009). As the Court explained, those decisions "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims," because the employees in those cases "had not agreed to arbitrate their statutory claims." *Id.* at 264 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)). The three cases therefore addressed only whether, when the "arbitrators were not authorized to resolve such [statutory] claims," the arbitral award resulting from the overlapping "contract-based claims precluded subsequent judicial resolution of statutory claims." *Id.* (citation omitted). The *Pyett* Court stated that, given the arbitrators' lack of authority to resolve the statutory claims in that trilogy of cases, "the

arbitration in those cases *understandably* was held not to preclude subsequent statutory actions." *Id.* (emphasis added). *Pyett* held that "*Gardner-Denver* and its progeny thus do not control the outcome where, as is the case here [in *Pyett*], the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims." *Id.* Because the parties had agreed to submit the statutory claims to arbitration, and no congressional policy overrode that choice, *Pyett* held that the lower courts had erred in refusing to compel arbitration of the statutory claims. *See id.* at 257-58; *see also Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 226 (1987) (stating that the FAA generally "mandates enforcement of agreements to arbitrate statutory claims," subject to that mandate being "overridden by a contrary congressional command").

This case plainly falls within the *Gardner-Denver* line of cases, even as narrowly construed in *Pyett.* The Court in *Pyett* stated that, under the *Gardner-Denver* line of cases, preclusion "understandably" would not be afforded to an arbitral award so as to bar litigation of a statutory claim when the "arbitrators were not authorized to resolve such claims." 556 U.S. at 264. That narrow principle squarely applies here, because, in light of § 1514A(e), the arbitrator in this case was explicitly *not* authorized to decide the Sarbanes-Oxley retaliation claim. The predicate for application of the *Gardner-Denver* rule is therefore present here, and under that rule preclusive effect may not be given, vis-à-vis the Sarbanes-Oxley retaliation claim, to the arbitrator's decision.

Indeed, the result here is arguably on more solid footing than even the *Gardner-Denver* trilogy of cases themselves, because none of those cases involved a statute with a comparably explicit prohibition on waiving judicial remedies and opting for arbitration. Moreover, in *Pyett,* the Court sharply criticized the "broad dicta" in "the *Gardner-Denver* line of cases" that "were highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights," 556 U.S. at 265, and we have construed the Court's post-*Gardner-Denver* case authority as "reject[ing] a reading of [*Gardner-Denver*] as *prohibiting* the arbitration of employment discrimination claims." *EEOC v. Luce, Forward, Hamilton & Scripps,* 345 F.3d 742, 748 (9th Cir. 2003) (en banc) (emphasis added) (citations and internal quotation marks omitted). Thus, given that Title VII claims *can* be submitted to arbitrators, there will presumably be few cases calling for the application of the actual holding of *Gardner-Denver*—*viz.,* that an arbitral award rendered by arbitrators who *lacked* authority to decide a Title VII claim will not be given preclusive effect against such a claim. But nothing in subsequent Supreme Court caselaw has abrogated the narrow non-preclusion rule reaffirmed in *Pyett, see Mathews v. Denver Newspaper Agency LLP,* 649 F.3d 1199, 1204-08 (10th Cir. 2011), and in light of § 1514A(e), this case falls within that rule.

C

In reaching a contrary conclusion, the majority first suggests that the *Gardner-Denver* line of cases is strictly limited to "unconfirmed arbitration awards" and therefore

cannot apply to the confirmed arbitration award at issue in this case. *See* Opin. at 1172 n.6. That argument misses the mark. *McDonald* emphasized the lack of judicial confirmation in explaining why the "Federal Full Faith and Credit Statute, 28 U.S.C. § 1738," did not require the Court to adhere to *state-law* preclusion principles in considering the effect of the unreviewed arbitral award in that case. *McDonald*, 466 U.S. at 287. As the Court explained, the relevant language of § 1738 extends full faith and credit only to "judicial proceedings," and because an "unappealed arbitral award" does not involve a judicial judgment, § 1738 is inapplicable in the context of such awards. *Id.* at 287-88. As a result, the *McDonald* Court held that it was not required by § 1738 "to give the same preclusive effect to a state-court judgment *as would the courts of the State rendering the judgment.*" *Id.* at 287 (emphasis added). Instead, the Court was free to "judicially fashion[]" a *federal* "rule of preclusion" as a matter of federal common law, and it fashioned the rule that I have described above. *Id.* at 288. By contrast, we have held that, under "the plain language of section 1738," *state-law* preclusion principles will control when a state court renders a judgment confirming an arbitral award. *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989); *see also id.* at 1178 n.2 (noting that, by contrast, "[t]he federal courts have frequently fashioned federal common law rules of preclusion where § 1738 does not apply"). Here, as I have already explained, federal common law governs the preclusive effect of the federal district court's confirmation of the arbitral award rejecting Hansen's federal and state claims. *See supra* note 1. And given that the *Gardner-Denver* rule is part

of the relevant federal common law preclusion principles that govern here, it applies in this case.

The majority also claims that, in *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985), the Supreme Court undermined the *Gardner-Denver* non-preclusion rule by "suggesting that arbitration awards may sometimes be able to preclude federal claims, even when those claims could not themselves be resolved in arbitration." *See* Opin. at 1169. *Byrd* said nothing of the sort. *Byrd* merely held that, when confronted with both arbitrable and arguably non-arbitrable claims, a court should not decline to compel arbitration of the arbitrable claims based on a concern that "the findings in the arbitration proceeding might have collateral-estoppel effect in a subsequent federal proceeding." 470 U.S. at 221. Neither a stay of arbitration nor a federal court adjudication of the arbitrable claims was warranted on such grounds, the Court explained, because any such preclusion-based concern can be addressed by "the formulation of collateral-estoppel rules" that will "afford[] adequate protection to that interest." *Id.* at 222. Far from being a rejection of the *Gardner-Denver* cases' limits on preclusion, *Byrd* held that arbitration could go forward in such mixed cases precisely because preclusive effect could later be *denied* to the arbitration award if warranted. *Id.* In fact, *Byrd* specifically relied on *McDonald* in concluding that, after the arbitration was completed, the "courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding." *Id.* at 223 (citing *McDonald,* 466 U.S. at 287-88).

The majority also asserts that this court's caselaw has retreated from the narrowed *Gardner-Denver* rule, but that too is wrong. The majority notes that we afforded preclusive effect to an arbitration award in *C.D. Anderson & Co., Inc. v. Lemos,* 832 F.2d 1097 (9th Cir. 1987). But the predicate for application of the *Gardner-Denver* rule was not present in *C.D. Anderson,* and it is therefore not surprising that we did not apply it. As we noted in *C.D. Anderson,* the plaintiff had affirmatively *agreed* to submit its "securities law and RICO claims" to arbitration, despite contending that those claims were non-arbitrable and that it "could not waive its right to litigate the claims in federal court." *Id.* at 1099. We rejected the plaintiff's non-waivability argument and held that it *had* "waived any right it had to litigate those claims in federal court." *Id.*; *see also id.* (holding that, in light of this valid waiver, we assertedly did not need to decide whether we could apply retroactively the Supreme Court's holding in *Shearson/American Express,* 482 U.S. at 238-42, that Rule 10b-5 and RICO claims were arbitrable). Because the arbitrator in *C.D. Anderson* thus *did* have authority to decide those claims, the predicate for application of the *Gardner-Denver* rule—*viz.,* that the "arbitrators were not authorized to resolve such claims," *Pyett,* 556 U.S. at 264—was absent in *C.D. Anderson.*

Our decision in *Clark v. Bear Stearns & Co., Inc.,* 966 F.2d 1318 (9th Cir. 1992), is also inapposite. Because the parties' agreement there did *not* allow arbitration of the plaintiff's "federal securities claims," the district court compelled arbitration of the remaining claims and stayed the securities claims pending the outcome of the

arbitration. *Id.* at 1320-21. The fact that the parties' agreement denied the arbitrator the authority to decide the securities claims arguably did provide a predicate for applying the *Gardner-Denver* rule against giving issue-preclusive effect to the arbitration, but we said nothing about any such rule (perhaps because it was not raised by the parties).[2] Instead, we noted that, under *C.D. Anderson,* there is no categorical prohibition on giving preclusive effect to an arbitration award "even if the underlying claim" to be precluded "involves the federal securities laws." *Id.* at 1321. We nonetheless ultimately denied preclusive effect to the arbitral decision on other grounds, holding that the defendants had failed to carry their burden to establish "the exact issues previously determined" in the arbitration and that, as a result, collateral estoppel could not be applied. *Id.* at 1322-23. Because *Clark* denied issue-preclusive effect on other grounds and never squarely addressed whether the *Gardner-Denver* rule should have yielded the same result, our decision in that case cannot be understood as somehow recognizing an abrogation of that rule (which, of course, we would have no authority to do in any event).

In short, neither *Clark* nor *C.D. Anderson* considered, much less rejected, the still-binding, narrow *Gardner-Denver* rule that the majority wrongly fails to apply in this case.

* * *

2. We did recognize, however, that the arbitrator's lack of jurisdiction over the securities claims did mean that res judicata—*i.e., claim* preclusion—could not apply. *Clark,* 966 F.2d at 1321.

For the foregoing reasons, I would reverse the district court's dismissal of Hansen's Sarbanes-Oxley whistleblower retaliation claim on preclusion grounds and remand for further proceedings concerning that claim. I would otherwise affirm the district court's judgment. I therefore respectfully dissent in part and concur in the judgment in part.

APPENDIX B — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED JULY 25, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Case No. 3:19-CV-00413-LRH-CSD
MINUTE ORDER
7/25/2022

KARL HANSEN,

Plaintiff,

v.

ELON MUSK; TESLA, INC.; TESLA MOTORS, INC.; U.S. SECURITY ASSOCIATES; DOES 1 THROUGH 50,

Defendants.

PRESENT: THE HONORABLE LARRY R. HICKS,
UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: NONE APPEARING
REPORTER: NONE APPEARING

COUNSEL FOR PLAINTIFF(S):
NONE APPEARING

COUNSEL FOR DEFENDANT(S):
NONE APPEARING

Appendix B

MINUTE ORDER IN CHAMBERS:

On July 15, 2020, the Court granted Defendants' motion to compel arbitration and instituted a stay pending arbitration. Now, the parties have since filed an unopposed motion to lift the stay and confirm the arbitration award of the Hon. Carl (Bill) W. Hoffman, Jr. (retired) denying Plaintiff's claims in their entirety. Finding no reason to overturn the arbitrator's decision, the Court will lift the stay and adopt the June 8, 2022 Award as a final, enforceable judgment of the Court.

As to the issue of the remaining SOX claim, Defendants' shall have twenty-one (21) days after entry of this Order to file their motion to dismiss. Plaintiffs shall then have twenty-one (21) days to file his points and authorities in response to the motion, and Defendants shall have fourteen days (14) to file a reply.

IT IS THEREFORE ORDERED that the unopposed motion (ECF No. 61) is GRANTED and the stay in this matter is LIFTED.

IT IS FUTHER ORDERED that the Court adopts the award of the Arbitrator (ECF No. 61-1) as a final, enforceable judgement and dismisses two of Plaintiff's claims with prejudice: (1) intentional interference with contractual relations; and (2) breach of contract.

IT IS SO ORDERED.

DEBRA K. KEMPI, CLERK
By: /s/_____
Deputy Clerk

APPENDIX C — FINAL ARBITRATION AWARD, FILED AUGUST 16, 2022

JAMS ARBITRATION
CASE REFERENCE NO. 1260005897

KARL HANSEN,

Claimant,

and

ELON MUSK, TESLA, INC.; TESLA MOTORS, INC., AND U.S. SECURITY ASSOCIATES,

Respondents.

FINAL AWARD

I. Introduction and Procedural Statement

A. Parties and Counsel. The parties to this arbitration are identified in the caption and are represented as follows:

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Appendix C

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B. Arbitration

In Las Vegas, Nevada, this matter came to arbitration in accordance with the parties' arbitration agreement contained in the Non-Employment, Non-Disclosure, Invention Assignment, and Arbitration Agreement signed July 17, 2018, which provides that any dispute arising out of or relating to the Agreement shall be determined by arbitration before JAMS using its Employment Arbitration Rules and Procedures. The undersigned arbitrator, having examined the submissions, proof and allegations of the parties, finds, concludes and issues this Final Award, as follows.

Prior to the evidentiary hearing, the parties submitted briefs regarding Respondents' joint motion to dismiss. The "Interim Award Re: Respondents' joint motion to dismiss counts III-IV of the Third Amended Complaint" dated February 11, 2021 is hereby incorporated by reference, and determined to be final for purposes of this award. Of note, Count III alleging a RICO violation was dismissed.

Additionally, prior to the evidentiary hearing, the parties submitted briefs regarding Respondent's motion for summary judgment. The "Tesla's and USSA's Motions for Summary Judgment: Interim Award (corrected)" dated March 7, 2022, is hereby incorporated by reference, and determined final for purposes of this award. The Interim Award was clarified and reconsidered on March 14, 2022. Of note, the claims against USSA for breach of contract in Count II and intentional interference with contractual

relations in Count I were dismissed. Also dismissed was the claim against Tesla for breach of contract in Count II.

Because Hansen's other claims were dismissed, as discussed above, the remaining claims for consideration at the hearing were Count I, Intentional Interference with Contractual Relations by Tesla, and Count IV, Retaliation under the Dodd-Frank Wall Street Reform & Consumer Protection Act by both USSA and Tesla. The evidentiary hearing was conducted in person and by Zoom videoconference on April 11, 12, and 13, 2022. Each side offered documentary evidence at the hearing, and such evidence was admitted. A court reporter recorded the arbitration, and the record was provided on April 25, 2022. Claimant Hansen, Jacob Nocon, Jenna Ferrua, Valerie Workman, and Matt German were called as witnesses and cross-examined. At the conclusion of the hearing, the parties stated that they desired to submit post-hearing briefs, which were provided on May 20, 2022. The case was then submitted for decision.

II. Facts and Analysis

On January 8, 2018, Hansen applied for a position with Tesla as a Protection Associate at the company's Gigafactory located in Sparks, Nevada. Tesla offered Hansen a position as a Protection Associate with a rate of pay of $16.50 per hour by letter dated February 26, 2018. On March 5, 2018, Hansen began his employment with Tesla as a Protection Associate. During his employment, he assisted with investigations into activities occurring within the Gigafactory, including thefts and drug related activities.

Appendix C

On or about June 19, 2018, Plaintiff was informed along with numerous other employees that his position with Tesla at the Gigafactory was being eliminated due to restructuring. While there were discussions about retaining certain of the Protection Associates, ultimately all of the Protection Associates at the Gigafactory were included within the reduction in force and the work was outsourced to a third-party contractor, U.S. Security Associates, Inc. ("USSA").

On June 1, 2018, as part of the reduction in force and reassignment of personnel to an outside contractor, "USSA" entered into a Master Services Agreement (the "MSA") with Tesla to provide security services at the Gigafactory. Pursuant to the MSA, USSA hired individuals to work at the Gigafactory to assist with security. These individuals were employees of USSA and were not employees of Tesla. Pursuant to Section 3.3 of the MSA, Tesla retained the right to determine which of USSA's subcontractors worked at its facilities.

On or about June 21, 2018, Hansen completed a USSA Application for Employment for a "Security Officer" position. As part of his application, Hansen signed a statement of applicant agreeing that he "ha[d] read this Statement and agree to the terms hereof completely." Hansen understood that USSA "could terminate [his] employment at any time for any reason." As part of his application to USSA, Hansen acknowledged USSA's "policy prohibiting disclosure of confidential and proprietary information of its clients, including Tesla."

Appendix C

Hansen's last day as a Tesla employee was July 16, 2018. On July 17, 2018, Hansen was transitioned from Tesla to USSA, and expressly acknowledged that he was no longer employed by Tesla. He continued to perform his security officer duties at the Gigafactory and was paid at the rate of no less than $19.80 per hour.

Unknown to Respondents, Hansen provided confidential information about Tesla's operations at the Gigafactory to the media on August 1, 2018. On August 3, 2018, Hansen provided information by email to Musk and others in Tesla regarding allegations of cartel involvement in the supply of batteries, counterfeit badges at the factory, theft at the factory, and improper awards of contracts and significant thefts at the Gigafactory. These were all matters of which Hansen became aware while performing his duties as a security officer or investigator at Tesla.

Valerie Workman testified that she was the Chief Compliance Officer at Tesla's legal office at the time Hansen sent his August 3, 2018 email to Musk. Workman testified that within 24 hours of the email, she began to investigate Hansen's allegations. She asked to meet with Hansen, but aside from an initial intake meeting with a member of the employee relations team, Hansen refused to meet with her or anyone else at Tesla.

On August 9, 2018, Hansen filed a Tips, Complaints, and Referrals (TCR) complaint at the Securities and Exchange Commission (SEC) containing information regarding his concerns about thefts and cartel activity at

the Gigafactory. On August 16, Hansen' s attorney issued a press release concerning the TCR. It is undisputed that Tesla and Musk were aware of these activities.

Later, on August 23, 2018, Ken Davis, a Tesla security supervisor, sent an email to Musk and others, the subject of which was "Karl Hansen - SEC Whistleblower - Immediate Attention?" Davis's email expressed concern that Hansen was a security threat due to his current role in an ongoing SEC investigation. He expressed concern that Hansen was in a position, as a guard, to provide access to Tesla information to outsiders including his attorney, and that he had the monetary incentive to do so in light of his on-going claims against Tesla.

Workman testified that she was provided with Davis's email, and she then changed the course of her investigation from investigating Hansen's allegations about activity at the Gigafactory to an investigation into Hansen's activities. In order to conduct her investigation, she requested and received permission to review Hansen's emails, and then learned that Hansen had sent numerous emails outside of Tesla containing a large volume of Tesla confidential information. Hansen had emailed numerous confidential Tesla documents to members of the media, his girlfriend, and others. Hansen later admitted taking this material, sending it outside Tesla to a variety of people, and violating Tesla's policies.

On August 29, Hansen was interviewed on Fox News about his TCR. Workman testified that this was "big news," at least in the Tesla legal community of which she

was a member. On August 31, 2018, Workman reported the results of her investigation to Tesla Human Resources representative Jenna Ferrua, Tesla's business associate Jeff Jones, and Deputy Legal Counsel Ussuf Mohammed. Workman testified that the group collaborated about what to do in light of the investigation, and decided that Hansen's reassignment was appropriate because of the "exfiltration" of Tesla's confidential documents in violation of Tesla's policies. She indicated that such a collaboration was typical for such matters. When asked whether the SEC complaint made any difference on Tesla's decision to reassign Hansen from the Gigafactory, she testified "absolutely not" because clear violations of Tesla's confidentiality policies had been found.

Jenna Ferrua testified that she was the HR representative involved in a collaborative discussion of Workman's investigation findings about Hansen. She typically was part of a collaborative group which would make such decisions and participated in many such discussions. She testified that the policy violation of Tesla's confidentiality rules was clear, and that reassignment of contractors was the normal outcome in the past when such misconduct had been discovered. She testified that she did not know about Hansen's SEC complaint when she participated in the reassignment decision.

Once the decision was made, Ferrua testified that she called USSA and requested Hansen be reassigned from the Gigafactory. On September 4, 2018. Tesla's outside counsel indicated in a letter to Hansen's SEC counsel that Tesla had confirmed discovery of numerous

violations of Tesla policies, including that Hansen had intentionally deleted nearly his entire "sent" folder from his email account, and had forwarded numerous Tesla internal documents to his personal Gmail account. The letter indicated that Tesla had decided to have USSA reassign Hansen, but specifically said it took no position on his continued employment with the USSA.

Hansen's employment with USSA continued until January 2019 when he resigned from USSA for a higher paying position.

A. Count IV, Retaliation under the Dodd-Frank Wall Street Reform & Consumer Protection Act.

Count IV alleges that Hansen engaged in protected activity under Dodd-Frank when he submitted information to the Securities and Exchange Commission (SEC) regarding Tesla's misconduct, and subsequently was the victim of retaliation when his position at Tesla was eliminated and he was reassigned from the Gigafactory. Hansen specifically alleges that "on or about September 4, 2018, Tesla pressured USSA to breach its agreement with Hansen by retracting offers, demoting Hansen, and ultimately terminating Hansen, thus taking his property in violation of Dodd-Frank."

Section 922 of Dodd-Frank protects whistleblowers who provide information to the SEC from retaliation. It defines a whistleblower as "any individual who provides ... information relating to a violation of the securities laws

to the Commission, in a manner established, by rule or regulation by the Commission." 15 U. S. C. §78u-6(a)(6). A whistleblower so defined is protected from retaliation in three situations, *see* §78u-6(h)(l)(A)(i)-(iii), including providing information to the SEC about securities law violations, assisting in an SEC action, or making disclosures required or protected under Sarbanes Oxley or any other law, rule or regulation subject to the SEC's jurisdiction. In order to prove a *prima facie* claim under this provision, a plaintiff must establish he engaged in protected activity, the employer knew about that activity, and a causal connection between the protected activity and an adverse employment action. Retaliation must be proved according to the traditional principle of but-for causation, not the lessened motivating factor causation test.

On August 9, 2018, Hansen filed a Tips, Complaints, and Referrals (TCR) complaint at the SEC. The TCR alleges a variety of facts back to April of 2018, when Hansen was still employed by Tesla, and alleges that the conduct appears to be a violation of Sections 17(a)(2) and (3) of the Securities Act of 1933, among other securities laws.

1. Hansen's Dodd-Frank claim against USSA.

Matt German was the designated corporate witness for USSA. He testified that he was aware of Hansen's letter of August 3, 2018, but USSA took no action regarding the letter because it addressed Tesla issues, not USSA issues. German was made aware by Hansen that Tesla desired to meet with Hansen after the August 3, 2018 email was sent, and that Hansen did not want to meet with Tesla.

German suggested to Hansen that Hansen meet with Tesla representatives, but if the meeting went poorly, he could terminate the meeting.

German testified that on August 30, 2018 he had a conversation with Tesla's Jeff Jones who asked that Hansen be removed from guard assignment at the Gigafactory. German indicated that in the sixty-second call with Jones, no reason was provided for the reassignment, but that it was mentioned that Musk had some sort of negative experience with Hansen while Hansen was stationed at one of the entry gates to the factory. No details were provided.

On about September 4, 2018, German became aware that Hansen was to be removed from his assignment at the Gigafactory. No reason was provided. German knew that under the MSA, Tesla had the contractual right to refuse the assignment of USSA contractors at the Gigafactory. Hansen had previously told German that Tesla representatives wanted to talk with him regarding his August 3, 2018 email, and German suspected the reason that Hansen was reassigned was Hansen's refusal to meet regarding the email. German testified that he did not know that Hansen had reported anything to the media, had improperly taken any documents from Tesla, or that he subsequently made a TCR report or any other report to the SEC. German testified that he did not believe that the reason for Hansen's removal was for any improper or illegal reason. On September 5, 2018, USSA removed Hansen from his Gigafactory assignment, and subsequently reassigned him to another USSA project.

Based upon this evidence, USSA could not have retaliated against Hansen for making a complaint to the SEC because it was not aware that the TCR was filed, or that any protected activity had occurred. Accordingly, Hansen has failed to prove that Hansen's SEC complaints caused USSA to reassign him from the Gigafactory. Hansen's claim against USSA fails.

2. Hansen's Dodd-Frank claim against Tesla

Tesla argues that Hansen did not engage in activity protected by Dodd-Frank because under that law, the alleged violations must relate to specified categories of fraud or fraud on the company shareholders, and Hansen's claims do not.

Hansen's primary allegations relate to the alleged unlawful transport and sale of drugs and theft of copper wire. Hansen provided no evidence to prove that the alleged thefts or drug activity had any impact on Tesla's financial statements or SEC filings or amounted to securities violations as defined by Dodd-Frank. Garden variety theft and drug violations are matters governed by state and local law, not Dodd-Frank. Hansen provides no argument to the contrary. Accordingly, I find that Hansen did not engage in protected activity as defined by Dodd-Frank.

Tesla also argues that Hansen did not engage in protected activity because there was no reasonable basis to believe the conduct constituted a violation of the specified categories in the statute. To prevail, Hansen must

prove that a "reasonable person" would have believed the reported conduct violated federal securities laws based on the knowledge available in the same factual circumstances to someone with the same training and experience as the reporting employee. *See*, Exchange Act Release No. 34-64545, at 15-16 ("'reasonable belief standard requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess.").

Hansen testified he is not aware of what is included in Tesla's financial statements or is reported to shareholders. Moreover, Tesla's investigation into his allegations found no evidence to support his claims about Mexican drug cartels. Nor did they support his extensive theft claims. Hansen had not conducted an independent investigation to support his claims, but rather relied upon another employee' s claims. Accordingly Hansen' s complaints were not related to a securities law violation, as required by Dodd-Frank, and he did not have an objective basis to believe such a violation had occurred.

Even if Hansen's TCR was protected activity, Tesla argues that Hansen's whistleblowing was not the "but for" causation for his reassignment. Rather, it argues that Hansen was removed from the Gigafactory for independent reasons, that is, the multiple violations of Tesla's policies. Under Dodd-Frank, the plaintiff must demonstrate that his employment would not have been terminated but for his protected conduct.

Hansen argues that causation for the reassignment can be inferred from timing alone when an adverse employment action follows on the heels of protected activity. Hansen argues that the filing of the TCR on August 9, 2018 and his SEC attorney's press release concerning the TCR on August 16, 2018 and then his reassignment within a few days on September 4, 2018 establishes causation, and that the timeline speaks for itself.

Other than timing, Hansen offers no evidence to contradict Tesla's evidence presented by Workman and Ferrua that the collaborative group decided the reassignment was appropriate because of Hansen's policy violations. Tesla's evidence is persuasive. Workman testified credibly that the SEC complaints had no impact on the reassignment decision because Hansen's policy violations were so extensive. Ferrua testified that she was unaware of the SEC complaint at the time the decision was made. If Workman believed that the SEC complaint was relevant, she likely would have brought it to Ferrua's attention during their collaboration with Jones and Muhammed. But Ferrua testified that she was not aware of the SEC complaint, and so it must not have been discussed. Additionally, Hansen was a contractor, and Ferrua testified that reassignment was Tesla's typical response to policy violations by contractors. More importantly, given the extraordinary volume of confidential and sensitive personal information of Tesla employees discovered to have been "exfiltrated" by Hansen, a fact which Hansen does not dispute, it was reasonable to reassign Hansen regardless of his SEC

complaint. Tesla's letter to Hansen's SEC lawyer was consistent with the evidence developed by Workman, and also Ferrua's testimony that the SEC complaint did not matter. Accordingly, Tesla has provided a legitimate business reason for its decision, and Hansen's inference of temporal proximity is insufficient to demonstrate that the reassignment was pretextual.

Hansen also argues that Tesla's inconsistent treatment of Hansen prior to and after his protected activity raises an issue of material fact as to whether, but for exercising his rights, he would have been reassigned. The undisputed evidence from the Tesla decision makers who collaborated to decide to make the reassignment, however, is that it was based upon the discovery of the Hansen's extensive removal of Tesla documents. Hansen's treatment is easily explained by the discovery of his extensive policy violations.[1]

Hansen has not established that his reassignment was made in violation of Dodd-Frank. Tesla has demonstrated that the reason for Hansen's reassignment was because of his policy violations, its response to the policy violations was reasonable, and it was not in retaliation for filing a complaint with the SEC.

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1. Respondents' arguments that the reassignment was not an adverse action, that a report to the media is not protected activity, and that Hansen failed to prove damages are not analyzed here because, in light of the findings here, the issues are moot.

B. Count I, Intentional Interference with Contractual Relations

Count I first alleges that Hansen had a three-year contract with USSA to provide security services, and that Musk and Tesla interfered with Hansen's contract with USSA by pressuring USSA to terminate its three-year contract with Hansen because Hansen had complained about Tesla's illegal activities to his supervisors and was a whistleblower to the SEC. Hansen's claim that a three-year contract existed with USSA was previously dismissed.

Hansen further alleges that, because of pressure from Tesla, USSA breached its contract by eliminating Hansen's newly assigned position. Hansen's complaint alleges that Tesla interfered with the "at-will" employment agreement that he had with USSA by preventing his assignment to the Gigafactory, claiming that "Musk and Tesla did not have a right to decide the personnel USSA would use to staff the Gigafactory."

To prove the intentional interference claim, the parties agree that Hansen must prove (1) there is a valid contract between Hansen and USSA; (2) Tesla knew of that contract; (3) Tesla committed intentional acts intended or designed to disrupt the contractual relationship; (4) there was an actual disruption of contract; and (5) resulting damages. *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 862 P.2d 1207 (Nev. 1993). The element of actual breach or disruption "requires that a plaintiff show either an actual breach of a contract or a

significant disruption of a contract...." *Rimini Street, Inc. v. Oracle Intern. Corp.*, 2020 U.S. Dist. LEXIS 168222, 2020 WE 5531493, *8 (D. Nev. 2020).

Hansen's claim fails for several reasons. First, an at-will employee relationship is not a contract with which a third party can interfere. *See Kwiatkowski v. Hartford Fire Ins. Co.*, No. 2:08-cv-00730 RCJ-LRL, 2009 W.L 10679304, at *4 (D.Nev., Nov. 18, 2009), citing *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 912 (D.Nev. 1993). Hansen's claim fails because it is undisputed that he was an at-will employee of USSA.

Second, Hansen's employment with USSA, and his assignment at the Gigafactory, was based upon the MSA. Pursuant to Section 3.3 of the MSA, Tesla had the right to determine which of USSA's subcontractors worked at its facilities. Hansen had no contractual right to be assigned to the Gigafactory, or any other location. Thus, according to the MSA, Tesla could decide that Hansen not be assigned to the Gigafactory. *See Rimini St.*, 473 F. Supp. 3d at 1186 ("Rimini cannot plausibly argue that Oracle must give access to its own support website to anyone who requests it); *Leavitt v Leisure Sports Incorporation*, 734 P. 2d 1221, 1226 (1987) (defendants acted appropriately to protect the interest they had acquired via a valid contract, and thus were privileged.) Tesla had an absolute legal right to request Hansen's reassignment.

Hansen argues that Tesla interfered with the at-will contract as retaliation for the TCR in violation of Dodd-Frank. But for the reasons previously discussed, Tesla

and Musk did not retaliate against Hansen because of his SEC complaint, and Dodd-Frank's prohibitions against retaliation were not violated. Rather, Tesla reassigned Hansen because of his extensive violations of Tesla policies against disclosing confidential and personnel information. Accordingly, Tesla was privileged to exercise its contractual rights under the MSA to require that USSA reassign Hansen from the Gigafactory, and did not commit an independently wrongful act in doing so.

Finally, Hansen suffered no adverse action from his reassignment from the Gigafactory. Hansen had no contractual right to be assigned to the Gigafactory. He continued his employment as a USSA security guard at a similar amount of pay. The element of actual breach or disruption requires that a plaintiff show either an actual breach of contract or a significant disruption of a contract rather than a simple impairment of contractual duties." Hansen's reassignment did not constitute an actual disruption of the contractual relationship with USSA because Hansen continued to be employed by USSA under the terms of their contract and suffered no pay loss or other adverse consequences from the reassignment.

Accordingly. Hansen has failed to prove that Tesla interfered with his USSA contractual relations.

III. Final Award

Claimant has failed to establish the claims contained in his demand for arbitration. Accordingly, his claims are denied, and he shall take nothing.

Appendix C

The Arbitration Agreement does not contain a fee shifting provision for attorney's fees. Under JAMS Arbitration Policies, the only fee that an employee may be required to pay is JAMS' initial Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fees and all professional fees for the arbitrator's services. Accordingly, absent additional information,[2] no further allocation of fees or costs is permitted in this matter.

To the extent any claim is not specifically mentioned herein, it is denied. This award resolves all issues currently before the arbitrator.

Dated: 6/8/2022

/s/ Bill Hoffman
Bill Hoffman, Arbitrator

2. *See*, *e.g.*, Rule 24, JAMS Employment Arbitration Rules and Procedures.

APPENDIX D — RELEVANT STATUTORY PROVISIONS

9 U.S.C. §§ 9–13

§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

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§10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the

award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney

within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

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The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Appendix D

18 U.S.C. § 1514A

(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.

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(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.