

APPENDIX

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25-807-cv
ABC v. DEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of May, two thousand twenty-six.

Present:

JOHN M. WALKER, JR.
EUNICE C. LEE,
BETH ROBINSON,
Circuit Judges.

ABC,

Plaintiffs-Appellees,

v.

No. 25-807-cv

DEF,

Defendant-Appellant.

For Plaintiff-Appellee:

BENJAMIN J. ASHMORE, SR.,
The Ashmore Firm PLLC,
New York, NY.

For Defendant-Appellant:

ALLAN S. BLOOM (Jordan B.
Glassberg, *on the brief*),

Proskauer Rose LLP, New
York, NY.

Andrew M. Sherwood,
Delonie A. Plummer, Jackson
Lewis P.C., New York, NY.

Appeal from a March 13, 2025 judgment of the United States District Court for the Southern District of New York (Torres, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**, and the action is **REMANDED** for further proceedings consistent with this order.

Appellant challenges the district court's grant of Appellees' motions to confirm an arbitration award and to dismiss Appellant's counter- and third-party claims, as well as the district court's denial of Appellant's motions for disqualification, partial denial of Appellant's motion to unseal, and order striking his oversized brief.

This appeal is the latest front in a years-long legal battle between the parties. That battle began in 2011, when Appellant filed a whistleblower lawsuit against Appellee, his former employer under Title VIII of the Sarbanes-Oxley Act of 2002. 18 U.S.C. § 1514A. In 2021, nearly a decade after that litigation commenced, the parties to that litigation entered into a settlement agreement, in which Appellee-employer made a settlement payment to Appellant in exchange for a release of his claims. The settlement agreement also included mutually binding confidentiality and non-disparagement provisions, as well as a liquidated damages clause that provided for an arbitration process and a set amount in liquidated damages if either party were to breach certain terms of the agreement, including the confidentiality and non-disparagement provisions.

About a month after the parties executed the settlement agreement, Appellee-employer filed a confidential demand for arbitration with a private arbitrator pursuant to the process laid out in the settlement agreement. In the demand for arbitration, Appellee-employer alleged that Appellant had breached the settlement agreement's confidentiality and non-disparagement provisions by publishing certain statements on a social media website. In the arbitration, Appellant brought several counterclaims. After motion practice, a multi-day evidentiary hearing, and closing arguments, the arbitrator dismissed Appellant's counterclaims and found that he had violated the settlement agreement's confidentiality and non-disparagement provisions and ordered Appellant to pay liquidated damages. Appellant, however, did not pay.

Appellee then filed a motion under seal to confirm the arbitration award in the district court for the Southern District of New York. Appellant cross-moved to vacate the arbitration award and brought a total of eleven counter- and third-party claims against Appellee-employer and several parties related to his former employer, including outside attorneys who represented it, its general counsel, and its parent company (who are third-party Defendants-Appellees in addition to Appellant's former employer). Appellant also moved to have the proceedings in the district court unsealed. After the parties engaged in significant and contentious motion practice, the district court confirmed the underlying arbitration award, denied Appellant's cross-petition to vacate the award, granted a motion to dismiss Appellant's counter- and third-party claims, and granted in part and denied in part Appellant's motion to unseal. This appeal followed.

We assume the parties' familiarity with the remaining underlying facts, the procedural history, and the issues on appeal.

I. Motions to Confirm or Vacate the Arbitration Award

The primary issue in this appeal is whether the district court erred in granting Appellee’s motion to confirm the arbitration award and in denying Appellant’s cross-motion to vacate that award. We review a district court’s decision to confirm an arbitration award *de novo* with respect to questions of law, and for clear error with respect to any findings of fact. *See Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 103 (2d Cir. 2013). As for the district court, its “role . . . in reviewing an arbitration award is ‘narrowly limited’” because arbitration “determinations are generally accorded great deference under the [Federal Arbitration Act].” *Id.* (second alteration in original) (quoting *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 19 (2d Cir. 1997)); *see also D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (“Normally, confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.” (internal quotation marks omitted)). As a result, “the burden of proof necessary to avoid confirmation of an arbitration award is very high, and a district court will enforce the award as long as ‘there is a barely colorable justification for the outcome reached.’” *Kolel*, 729 F.3d at 103–04 (quoting *Rich v. Spartis*, 516 F.3d 75, 81 (2d Cir. 2008)). Indeed, even if an arbitrator’s “rationale for an award [is not] explained, . . . the award should be confirmed if a ground for the arbitrator’s decision can be inferred from the facts of the case.” *D.H. Blair & Co.*, 462 F.3d at 110 (internal quotation marks omitted).

Both here and in the district court, Appellant raised various arguments as to why the instant arbitration award should be vacated. None of these arguments are meritorious. So, for substantially the same reasons stated by the district court in its well-reasoned opinion, we affirm the district court’s confirmation of the arbitrator’s final award and its dismissal of Appellant’s

cross-motion to vacate the award. *See* 9 U.S.C. § 9 (stating that courts “must grant” motions to confirm an arbitration award “unless the award is vacated, modified, or corrected”). In particular, although Appellant reasons *by analogy* to established law in other contexts, he fails to establish that the confidentiality and non-disparagement provisions enforced by the arbitration award violate a “well defined and dominant” public policy “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)). And he otherwise fails to show a “manifest disregard of the law”—that is, that the arbitrator’s liquidated damages award ignored “well defined, explicit, and clearly applicable” governing law and that the arbitrator was aware of “a clearly governing legal principle but decided to ignore it or pay no attention to it.” *Id.* (internal quotation marks omitted).

II. Counter- and Third-Party Claims

The district court also did not err in dismissing Appellant’s counterclaims and third-party claims. As the district court recognized, most of these claims are repackaged challenges to the enforceability of the confidentiality provision or its application to the communications that gave rise to Appellee’s claims in arbitration (Counts 1, 2, 5, 6, 7, and 11). *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979) (holding that the defensive “use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely switching adversaries” (internal quotation marks omitted)); *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001) (explaining that claim preclusion precludes relitigation of claims that were or should have been raised in prior arbitration between parties or their privies). To the extent his claims fall outside of those raised, or should have been

raised, in arbitration, they are inadequately briefed (Counts 3, 4, 8, 9, 10). *Tolbert v. Queens College*, 242 F.3d 58, 75 (2001) (declining to reach issues that are “adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation”).

III. Motion to Unseal

A. District Court Record

Appellant also contests the district court’s order with respect to his motion to unseal. He contends that the district court wrongly “determined to keep sealed *in toto* the case,” and that this Court should “resolve this issue on appeal” by unsealing it. Appellant’s Br. at 77. As an initial matter, the district court has not held that the proceedings before it in this case will remain sealed *in toto*. To the contrary, the district court agreed with Appellant that the parties’ “petitions, motions, memoranda of law, and underlying exhibits” in this case are “judicial documents,” which “are subject to a strong presumption of public access.” Special App’x at 22 (internal quotation marks omitted). The district court further explained that the parties’ settlement agreement, “which is conditioned on confidentiality, . . . does not overcome the presumption of access to judicial documents,” and ordered Appellee to “submit proposed redacted versions” of the documents it had filed in the district court. Special App’x at 22–23 (internal quotation marks omitted). Though the district court’s deadlines for such submissions have been stayed, that decision appears to be a product of Appellant’s appeal, not any unwillingness to unseal the record on the part of the district court. As a result, we decline to interfere with the district court’s pending decision to unseal parts of the record in that court as appropriate.

B. Proceedings In This Court

Relatedly, all the proceedings before this Court in this appeal are—to date—under seal.

However, as with the documents filed before the district court, any “documents submitted to a court for its consideration . . . are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.” *Lugosch v. Pyramid Co.*, 435 F.3d 110, 121 (2d Cir. 2006). Although this Court permitted the parties to file their papers under seal, it also ordered them to file “redacted version[s] . . . within seven days of submitting any sealed filing” pursuant to Local Rule 25.1(j)(2). *See* Mot. Order, Docket 26.1. And though the parties did so, the “redacted versions” of the briefs and appendices that the parties filed are redacted in their entirety, apart from the cover pages. Therefore, within thirty days of the district court’s final order on sealing, the parties are directed to file copies of their appellate briefs on the docket with only those redactions necessary to comport with the district court’s order.

* * *

We have considered Appellant’s remaining arguments, including his arguments that the district court judge should be recused and that the district court erred in precluding him from filing an overlong brief, and find them to be without merit. In particular, Appellant’s arguments as to recusal rest primarily on the district court’s adverse rulings and case management decisions, which “almost never constitute a valid basis for a bias or partiality motion.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). Appellant identifies no extrajudicial source of bias, and the record would not cause a reasonable person to question the court’s impartiality. The district court did not exceed its discretion in requiring Appellant to file a revised opposition brief that complied with the district court’s page limits.

For the reasons set forth above, we **AFFIRM** the judgment of the district court and **REMAND** for further proceedings consistent with this order. The parties are directed to file

copies of their appellate briefs with only those redactions necessary to comport with the district court's order within thirty days of the district court's final order.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

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

ABC,

Plaintiff - Appellee,

v.

DEF,

Defendant - Appellant.

ORDER

Docket No: 25-807

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

A circular official seal of the United States Court of Appeals for the Second Circuit is positioned over the signature. The seal features the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, separated by small stars.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

ABC,

Appellees,

v.

No. 25-807

DEF,

Appellant.

TRANSCRIPT OF ORAL ARGUMENT

HELD ON

TUESDAY, MARCH 24, 2026

BEFORE

THE HONORABLE JOHN M. WALKER, JR., CIRCUIT JUDGE

THE HONORABLE EUNICE C. LEE, CIRCUIT JUDGE

THE HONORABLE BETH ROBINSON, CIRCUIT JUDGE

THURGOOD MARSHALL UNITED STATES COURTHOUSE

40 FOLEY SQUARE, COURTROOM 1505

NEW YORK, NEW YORK 10007

1 APPEARANCES

2
3 Appearing on behalf of the Appellees:

4 ALLAN S. BLOOM, ESQUIRE

5 Proskauer Rose LLP

6 Eleven Times Square

7 New York, New York, 10036

8 (212) 969-3000

9
10 Appearing on behalf of the Appellant:

11 BENJAMIN J. ASHMORE, SR., ESQUIRE

12 The Ashmore Firm PLLC

13 Suite 300420 Lexington Avenue

14 New York, New York 10170

15 (800) 955-0629

1 TRANSCRIPT OF PROCEEDINGS

2 HELD ON

3 TUESDAY, MARCH 24, 2026

4
5 JUDGE LEE: ABC v. DEF. Thank you.

6 Okay. Mr. Ashmore, when -- whenever
7 you're ready.

8 MR. ASHMORE: Good morning, Your Honors.
9 May it please the Court.

10 I highlight our two principal contentions
11 on this appeal. First, the final award and the
12 decision below violate well defined and dominant
13 public policy found in FCA case law, the SOX statute
14 and its case law, New Jersey and New York statute
15 and case law, the analogous FLSA case law, and the
16 other employment related case law we cite, and even
17 recent NLRB decisions, one which was issued two
18 weeks ago -- I have it to hand to my adversary in
19 the Court if you would like, or we can file a FRAP
20 28(j) letter if the Court so wishes -- all of these
21 which make it illegal on public policy grounds to
22 penalize a litigant from making truthful statements
23 during litigation about illegal conduct and
24 underlying wrongdoing that they challenge by
25 bringing lawsuits.

1 Second, when a party, as here, has no
2 damages and undisputedly could not have had damages,
3 a huge liquidated damages penalty of \$750,000 at 9
4 percent state interest for over three years is
5 unenforceable under black-letter law without even
6 reaching the new provisions of New York General
7 Obligation Law section 5-336, which was enacted
8 while the case was briefed below, and in subsection
9 3 it has a bar on the return of any settlement
10 proceeds or consideration when it comes to alleged
11 breaches of clauses like the nondisparagement in
12 confidentiality clauses here.

13 As we noted in the brief, pages 42 through
14 43, FCA case law from in re JD Uniphase, Siebert,
15 and U.S. ex rel. Rood make clear that "whistleblower
16 type information about allegedly unlawful acts," and
17 the confidentiality clauses like what we have here
18 are "unenforceable as a matter of public policy
19 because it would frustrate Congress' purpose in
20 enacting the False Claims Act."

21 JUDGE ROBINSON: Can I ask a question just
22 about, you've -- you've provided a number of strong
23 analogies that -- that might suggest that a Court
24 should adopt a -- a public policy exception to the
25 enforceability of this -- this confidentiality

1 agreement in this contract.

2 I'm trying to figure out whether in
3 evaluating them, we come from the mindset that a
4 district court might have in evaluating breach of
5 contract claim in the first instance versus a
6 district court reviewing an arbitration award for
7 confirmation purposes.

8 Is it -- is it -- is it the same question
9 that you're asking yourself, as the Court?

10 MR. ASHMORE: I -- I would respectfully
11 submit, Your Honor, that it is not. W.R. Grace and
12 its progeny, and I believe Judge Walker's decision
13 in St. Mary makes clear that public policy questions
14 are for the courts, they're not for arbitration.
15 And they're for de novo review.

16 JUDGE ROBINSON: Yeah, I --

17 MR. ASHMORE: So the District Court should
18 review it on its own, but I -- I do submit to you
19 that there is a manifest disregard argument insofar
20 as these were all raised in the arbitration. The
21 arbitrator knew of them and he passed over them.

22 JUDGE ROBINSON: Yeah, I think I'm -- I
23 think you answered a slightly different question, so
24 let -- I'm now asking now whether the -- this is a
25 question for the arbitrator. You're saying it's a

1 question for the Court.

2 In answering the question, if you look at
3 the case law that says, well there might be a public
4 policy exception here. It says the public policy
5 must be well defined and dominant, and must be
6 ascertained by reference to the laws and legal
7 precedents, and not from general considerations of
8 supposed public interests.

9 If a district court were addressing public
10 policy, this had just come up as a breach of
11 contract claim in the court when there's no
12 arbitration, I'm not sure the test for whether or
13 not this would violate public policy that the
14 District Court would apply would be quite as onerous
15 as the test that's described there.

16 I think the District Court might have more
17 freedom to develop a public -- or acknowledge a
18 public policy exception by strong analogy to other
19 precedents, and I'm just trying to figure out
20 whether I'm wrong about that, that there isn't sort
21 of a higher bar that you have to meet because you're
22 asking us to validate an arbitration award on the
23 basis of those public policies.

24 MR. ASHMORE: Your Honor, our -- our
25 position is that -- that when it comes to the pure

1 public policy question, there is not a higher bar
2 just because this originated or came into the
3 District Court out of an arbitration proceeding.

4 JUDGE LEE: And do you have support for
5 that though?

6 MR. ASHMORE: Well, we would say, you
7 know, St. Mary's decision is clear, that -- that
8 public policy is one for the courts. And it's -- it
9 is -- it's something that is renewed anew and it
10 doesn't matter that it arises -- it doesn't matter
11 the context in which it arises. The issue is, does
12 the underlying decision violate public policy.

13 JUDGE ROBINSON: But -- but -- but it's
14 also framed by, I think that standard I just gave,
15 or do you think I just stated a higher standard and
16 it has to be a dominant policy well established by,
17 with reference -- in other words --

18 MR. ASHMORE: Well, I -- there certainly
19 has to be a dominant public policy that is well
20 established by laws. And I think we have that here,
21 Your Honor. We have New Jersey law. We have New
22 York law. We have all of the case holdings from the
23 myriad of cases that I -- that we've cited in our
24 brief.

25 JUDGE ROBINSON: But -- but that -- it's

1 all law that -- I mean, we have here a settlement
2 agreement, and you're making arguments about -- from
3 analogous areas of the law in which courts have
4 said, oh, there's a public policy overlay to these
5 confidentiality provisions.

6 I'm trying to figure out whether that kind
7 of analogical reasoning is within what's
8 contemplated by saying it's got to be a dominant
9 policy clearly established by the law. That's what
10 I'm struggling with.

11 MR. ASHMORE: I -- I think it is, Your
12 Honor, because if -- if Congress' purpose in
13 enacting the two statutes at issue, both the FCA and
14 the SOX case, because there were two litigations
15 that were settled.

16 If we look at Congress' purpose in
17 enacting those statutes, and every time the Supreme
18 Court, the Circuit Courts, and District Courts have
19 spoken about that policy, if during underlying
20 litigations about SOX or FCA violations, cannot be
21 sealed, they have to be under the air, the public
22 light of day, for all of the public policy reasons;
23 to encourage other whistleblowers to come forward,
24 the turn effect, then it stands to reason that in
25 sum they cannot then be sealed and retroactively

1 seal all evidence of the illegality and the
2 wrongdoing. That is the -- I think the key issue.

3 JUDGE ROBINSON: So -- so your client got
4 4.65 million for this settlement agreement. Now,
5 obviously some of that was money for settling the
6 actual claims.

7 MR. ASHMORE: Correct.

8 JUDGE ROBINSON: If we rule your -- in
9 your favor, would your client be subject to some
10 sort of action, mutual mistake as to the
11 enforceability of these terms actually to recoup
12 some of that money?

13 MR. ASHMORE: I don't believe so, Your
14 Honor, because there's a severability clause in the
15 severance -- or in the settlement agreement that if
16 anything were deemed -- if something like this were
17 to occur, it doesn't change the overall
18 characteristics of the settlement.

19 JUDGE LEE: All right. When you say
20 severability cause -- clause, what is -- in this
21 scenario that Judge Robinson has put forth, what is
22 -- what are you severing from what other thing? How
23 -- I don't understand how --

24 MR. ASHMORE: Simply severing the -- the
25 nondisparagement and the confidentiality clauses,

1 and the liquidated damages from them, from the
2 overall resolution of the litigations.

3 JUDGE LEE: I mean, that, I -- I don't --
4 so under your view, then, if we were to effectively
5 void this settlement agreement, the penalties are
6 not implied and the plaintiff keeps all of the money
7 that was given in the settlement agreement.

8 MR. ASHMORE: No, Your Honor. We're not
9 asking you to void the settlement agreement.

10 JUDGE LEE: No, no --

11 MR. ASHMORE: We are simply asking you to
12 void --

13 JUDGE LEE: The -- the penalty setup.

14 MR. ASHMORE: -- the -- the -- and I
15 should also note, and this came up in the District
16 Court in the arbitration. There are two views of,
17 you know, what was confidential. One side says it
18 was simply the terms of settlement and the amount of
19 the overall settlement. One side says it's
20 everything in the case that happened up through the
21 point of settlement.

22 But be that as it may, if you were to void
23 these specific provisions, that doesn't void the
24 fact that the -- the litigations were resolved,
25 there was no jury trial, the attorneys' fees were

1 paid. I -- I don't believe in any way it undoes the
2 settlement in its entirety, and I think that's
3 pretty clear by the -- the severability clause which
4 is in the appendix. It's paragraph 20 and it's on
5 A49 of the appendix.

6 The rest of the settlement agreement would
7 stand if any individual provisions within it were --
8 were deemed by a court of competent jurisdiction.

9 JUDGE LEE: But to kind of pull some
10 things out, and I mean the idea that part of what
11 the settlement was premised on were these specific
12 provisions, the likelihood that there would not have
13 been a settlement without this one. I guess we
14 can't -- we don't necessarily know that, but --

15 MR. ASHMORE: I think, Your Honor, we can
16 make a judgment about that, because if you go to the
17 appendix, if you -- it begins on page A310 of the
18 appendix. The parties reached an agreement in a
19 mediation, with the assistance of the Magistrate
20 Judge, on a dollar amount.

21 And then they started negotiating the term
22 sheets, and counsel, trial counsel for the appellant
23 raised an issue with confidentiality that looked
24 backwards, that they could not agree to
25 confidentiality of facts and circumstances because

1 there was such a public record of this case. And
2 that issue was raised in a series of emails.

3 When that issue was raised, my -- my good
4 friend here who was counsel below responded and did
5 not raise the red flag and say no, no, no, we want
6 confidentiality looking backwards. The only issue
7 they raised is, well no, our point of dispute is we
8 also want the FCA case settled. Yes, we went into
9 mediation in the SOX case, but we want the FCA case
10 settled.

11 So -- so my position would be that from
12 the outset of the settlement negotiations, it is
13 clear in the train of emails that are on -- they
14 begin on 311 and they go through -- I'm sorry, 313
15 and they go through 316, it's clear that the only
16 points of contention were whether both litigations
17 were going to be settled, and not whether there
18 would be backwards facing confidentiality,
19 effectively stripping out of the record looking
20 backwards, any reference to the illegality or any
21 reference to the public record.

22 JUDGE ROBINSON: So that's why getting to
23 the merits of the arbitrator's decision that we're
24 reviewing for a manifest, right. I mean, that --
25 and that's not even your main argument. Your main

1 argument is liquidated damages, if I'm...

2 MR. ASHMORE: Well, Your Honor, we raised
3 that on the manifest disregard, and I know -- I
4 think this case can be resolved on the public policy
5 argument, but if -- if the Court does get into the
6 manifest disregard, if you look at the questions
7 that the arbitrator asked of both sides in closing
8 arguments, it is clear, and again this is -- this is
9 in the appendix. It's between A611 and 618.

10 It is clear that the arbitrator knew of
11 the public policy, knew of the law with respect to
12 liquidated damages, knew about the ambiguities in
13 the contract, and -- and knew -- and disregarded all
14 of it.

15 In fact, for example at one point he asked
16 my good friend here, he said, this is at -- this is
17 in the transcript of the closing statements. He
18 asked if -- if there was any authority about taking
19 down and looking backwards.

20 He said, this is a contract that talks
21 about nondisclosure and confidentiality, but does
22 not explicitly say it applies only to future
23 conduct, nor does it explicitly have a takedown
24 action. And then he asked whether there were
25 authorities on this.

1 So he knew on all these manifest disregard
2 points what the law was on damages as argued by the
3 party, and he disregarded all of them.

4 JUDGE LEE: All right. All right. I
5 think we have your -- your argument. You have some
6 rebuttal time.

7 MR. ASHMORE: Thank you.

8 MR. BLOOM: Good morning, Your Honors.
9 May it please the Court. Allan Bloom from the
10 Proskauer Law Firm for the appellees.

11 The Court issue is whether Judge Torres
12 correctly granted our petition to confirm. My
13 client paid this gentleman \$4.65 million to settle a
14 case for confidentiality, for nondisparagement. He
15 breached those provisions.

16 We agreed to arbitration. We went to
17 arbitration. Judge Francis, an esteemed former
18 jurist, wrote a 28-page decision. And as the Court
19 has said, we are not here to revisit the factual
20 findings. We cannot do that. It is not de novo
21 review of the factual findings. It is not de novo
22 review of the reasoning. It is not de novo review
23 of Judge Francis' interpretation of the settlement
24 agreement.

25 This Court said that in Niagara Mohawk

1 too. This court has said that in Westerbeke,
2 particularly on the Court's limited review of an
3 arbitration award. It's not going to look back and
4 revisit factual findings. It's not going to look
5 back at reasoning or weighing of the evidence, and
6 that's exactly what this is.

7 This gentleman disagrees with Judge
8 Francis' award. That's his prerogative, but it is
9 not a ground to vacate it. And Judge Robinson, as
10 you said, it is a very different situation than
11 whether a judge, for example, in a fair labor
12 standards case or a New Jersey case is looking at a
13 document in the first instance. That's what Judge
14 Francis was doing. So it isn't --

15 JUDGE ROBINSON: Yeah, but, I mean, I
16 think for the public policy, I mean, this -- I --
17 I'm struggling with this a little bit because I
18 think for the public policy question, we're not
19 deferring to an arbitrator's assessment of the
20 public policy. But I'm not sure we're reviewing the
21 public policy, either the first instance or
22 something.

23 I think -- I'm trying to figure out where
24 on that sliding scale we are. Let's assume for a
25 minute that we conclude that there are very strong

1 analogies that would support the application of a
2 public policy exception here.

3 I guess, is that enough? And if -- if
4 not, why not?

5 MR. BLOOM: It's not enough for this
6 reason, Judge Robinson. The Supreme Court and this
7 court have made abundantly clear that there is no
8 broad judicial power to overturn, to vacate an
9 arbitration award as against public policy, full
10 stop. That's the Misco case at the Supreme Court.
11 That's the Schwartz case from this Court in 2011.
12 That this Court in Niagara Mohawk Power, Judge
13 Walker.

14 What -- what the Supreme Court and this
15 Court has said is you can only vacate an arbitration
16 award on public policy grounds where there is a
17 clearly defined and dominant public policy in
18 existence today. Not one that Mr. -- excuse me --
19 that my opposing counsel was asking this Court to
20 graft onto SOX, because there is unique FLSA
21 jurisprudence, which I'm happy to talk about. It
22 goes -- it goes back almost a century, but the
23 public policy would have to be well defined and
24 dominant today or the day that we entered into this
25 agreement. It doesn't exist.

1 And so what opposing counsel here is
2 asking --

3 JUDGE WALKER: Give me an example of
4 public -- give me an example of how public policy
5 would lead to a vacation, a vacatur of an
6 arbitration award.

7 Suppose I guess the arbitrator makes a
8 finding that in effect validates a fraud, clearly
9 validates a fraud, that it couldn't come out, you
10 can't possibly read it any other way, that it would
11 seem to me that if there's a discrete criminal
12 prohibition on a particular outcome, that that --
13 that that is clearly defined that nobody would
14 quarrel with, that that might be a violation of
15 public policy.

16 MR. BLOOM: I think you're right, Judge
17 Walker, and that's the only one I could think of
18 because none were cited, okay. So the only thing I
19 could think of would be --

20 JUDGE WALKER: The fact that there's --
21 there are purposes behind statutes --

22 MR. BLOOM: It's not enough.

23 JUDGE WALKER: That you could go back in
24 the Congressional records. You could determine that
25 certain statutes were designed to accomplish certain

1 things. That does not amount to the kind of public
2 policy that could lead, or we'd be -- we'd be
3 listening to these cases all the time.

4 MR. BLOOM: Judge Walker, that's exactly
5 what this Court said in Mohawk, because in Mohawk
6 you had an employee that was fired for breaching
7 safety regulations at a nuclear power plant. And he
8 filed a grievance and the arbitrator reinstated him
9 under the Collective Bargaining Agreement.

10 The District Court vacated the
11 reinstatement, vacated the arbitration award,
12 because it said it violated public policy. We all
13 like safety. We can't have this person back at
14 work. And there was a federal relation on point, a
15 Nuclear Regulatory Commission regulation that
16 required the company to provide very high assurances
17 of safety.

18 This Court reversed and said that federal
19 regulation is not enough to give rise to the public
20 policy. Niagara Mohawk has not met its burden of
21 showing a clear and unequivocal public policy.

22 And if you look at, by the way, at -- at
23 Misco at the Supreme Court, you had somebody who was
24 fired who was reinstated, and there was a conflict
25 with Title VII.

1 So I -- I think the answer to the question
2 is this. You need a dominant and well defined
3 public policy. There is none today. Opposing
4 counsel has not cited a single case that says that
5 there is some public policy under the Sarbanes-Oxley
6 Act that prohibits somebody from privately settling
7 a Sarbanes-Oxley Act claim, getting millions of
8 dollars, and promising not to disparage the other
9 side.

10 So essentially his claim is, I should be
11 able to privately settle. Then take the money,
12 agree to arbitration, then go disparage the other
13 side, and then say, well, you know, none of this was
14 okay in the first place. That's not how it works.

15 Whether you're looking at it from public
16 policy or manifest disregard, this is an
17 exceptionally narrow standard of review. And if it
18 wasn't, by the way, we'd all be in court every
19 single day, because this Court has said time and
20 time again that arbitrations are supposed to be --
21 or the confirmation of an arbitration, what is
22 supposed to be a summary proceeding, and here we are
23 years later.

24 So I would be happy to answer any other
25 questions this panel has. I don't think we've come

1 close to manifest disregard here. You need
2 egregious error.

3 On the issue of liquidated damages, Judge
4 Francis cited an appellate division case. He cited
5 a Northern District of New York federal case. It's
6 not the case that my opponent would have liked him
7 to follow, but he cited two cases on point, one of
8 them a New York State appellate case that says you
9 don't need to show actual damages.

10 Judge Francis wrote page after page
11 defending his factual findings, which Westerbeke --
12 this Court said in Westerbeke we can't go back and
13 revisit. There was testimony about the fact that
14 harm could not possibly have been ascertained back
15 at the time. It's all in this opinion. So there's
16 no basis to go back and -- and up -- and up-end this
17 arbitration award.

18 It's a very sound award, and I submit that
19 it should be confirmed summarily. And I also think
20 that this Court should affirm the dismissal of the
21 claims against me and my colleague and my law firm
22 and my client's general counsel who's here. You
23 can't sue lawyers because they're representing a
24 client.

25 Now that opposing counsel is now actually

1 a lawyer, he should know that. It's a bedrock
2 principal of American jurisprudence. I have no
3 relationship with this gentleman other than an
4 attorney for my clients in this case.

5 JUDGE LEE: All right.

6 JUDGE ROBINSON: Can I ask just one quick
7 question? The way that I understand the record, the
8 District Court hasn't yet made a final ruling about
9 what is and isn't sealed within the record.

10 Do you agree that it's premature for us to
11 address that, or am I missing something?

12 MR. BLOOM: I do. You know, the -- the
13 posture there, which is a little bit unusual, Judge
14 Robinson, is -- is the -- Judge Torres correctly
15 applying the standards, said that she would permit
16 my client to submit proposed, very select
17 redactions.

18 We were prepared to do that obviously, but
19 then the judge said let's wait until the Second
20 Circuit weighs in, because there was an appeal and
21 so we were --

22 JUDGE WALKER: Well, that puts us in a
23 little bit of a bind, doesn't it. Whatever ruling
24 we make here is going to be in writing. It's going
25 to consist of an opinion of one sort or another, or

1 a summary order. And we need to know what -- what's
2 -- what's sealed, what's not sealed in terms of --
3 of that order, or do we just give an order without
4 -- without detailed reasoning?

5 MR. BLOOM: Well, I -- I think the answer
6 is that there's no abuse of discretion. So on this
7 issue, the standard of review is abuse of
8 discretion.

9 JUDGE WALKER: Right.

10 MR. BLOOM: The Court ordered us to submit
11 proposed redactions, but stayed that process. If we
12 -- if -- I suppose if we go back down there, we --
13 and we submit proposed redactions and there's an
14 argument about that and a ruling about that, that we
15 can be back up here.

16 I hope that doesn't happen. We're going
17 to try our best to not make that happen, but I -- I
18 don't think the court below did anything wrong with
19 -- with respect to this, and I also -- I certainly
20 don't think the court -- there was any clear error.

21 JUDGE WALKER: This is a very unusual set
22 of circumstances. I'm just trying to think. If I
23 were a district judge in this area, I might prepare
24 an order, circulate it to the parties, and ask them
25 to comment on whether or not any -- anything in that

1 order should -- should be redacted for public
2 consumption, you know.

3 I don't know whether that would --
4 procedure would work here. It's certainly unusual
5 for us. I've never done it before.

6 MR. BLOOM: Yeah, I'll -- I'll say, Judge
7 Walker, we certainly didn't want to burden the Court
8 or the public with any application to -- to make
9 today's proceeding somehow confidential. So I
10 think, you know, from our standpoint all I can say
11 is now that we're so many years into this --

12 JUDGE WALKER: Most of the information is
13 out in the public domain anyway, isn't it?

14 MR. BLOOM: Other than what -- other than
15 certain terms of the settlement agreement, frankly.

16 JUDGE WALKER: I see.

17 MR. BLOOM: And -- and, you know, look, I
18 -- I think that it was sound of Judge Torres to say
19 that I am going to permit limited redaction, because
20 I don't -- I don't think we want to dissuade parties
21 from settling on the ground that very confidential
22 things might make their way out into the public
23 record.

24 I just -- I don't think that's good, but
25 again I would -- I would submit to whatever the

1 Court feels is appropriate. I don't think Judge
2 Torres committed clear error on this.

3 JUDGE WALKER: Okay.

4 JUDGE LEE: All right.

5 MR. BLOOM: Thank you, Your Honors.

6 JUDGE LEE: Thank you.

7 MR. ASHMORE: Your Honors, I want to
8 address just two points. One goes to Judge Walker's
9 question and a -- and a comment that my adversary
10 made about going out after settlement and making
11 disparaging comments.

12 To the extent, with respect to public
13 policy, there is even public policy in the law of
14 this case. It's important to note factually that
15 these very same statements that were uttered in 2013
16 and 2014 came before the District Court, and on
17 public policy grounds, First Amendment grounds, the
18 District Court said no, I am not going to order a
19 takedown order.

20 There was never any discussion afterwards,
21 and it wasn't until five weeks after settlement that
22 they -- they came out and frankly in an act of
23 ongoing retaliation said, well you never did take
24 these down post settlement, these very old
25 statements, even though the District Court said in

1 2014 he has a First Amendment right to re-post these
2 articles that discuss the illegality at issue in the
3 litigation.

4 So I certainly think there's a public
5 policy that's found in the law of the case.

6 JUDGE ROBINSON: Is there a difference
7 between a statement that's made, let's say, on your
8 social media feed a long time ago that's still there
9 and can be found by digging down, and a statement
10 that's sort of pinned to your home page? Even
11 though it was pinned there a long time ago?

12 MR. ASHMORE: Well, I -- so I think, you
13 know, under the facts of this case, Your Honor, this
14 was -- this was -- as Judge Walker said, this is an
15 unusual case. There is evidence in the record that
16 LinkedIn was no longer being used, that there wasn't
17 -- that the password and the user name was not even
18 known so it couldn't even be immediately taken down.

19 And while it didn't arise in this case, in
20 this era of two-factor identification and people
21 changing phone numbers and emails, there's --
22 there's a very conceivable hypothetical where
23 someone wouldn't even be able to access a long held,
24 you know, social media account to be able to log in
25 and change everything, because they can't re-set

1 their password.

2 They can't get re-set codes sent to emails
3 or phone numbers because they're no longer in
4 existence, but be that as it may, this was not, you
5 know, an Instagram or a Facebook that's being
6 regularly used.

7 This was an old, stale, LinkedIn page,
8 much like a whole plethora of other statements that
9 they have not alleged are breached that are still
10 out there in the ether that were made, but that go
11 to the point that when it is an old statement, it's
12 not a new affirmative breaching statement.

13 These were sophisticated lawyers. They
14 knew how to ask for takedown because they asked for
15 it in 2014, and they did not ask for it afterwards.

16 With respect to the sealing issue, I think
17 it's important to note that, you know, Lugosch and
18 its progeny requires tailored sealing orders, on-
19 the-record findings.

20 Our position from the outset of the
21 District Court proceeding was we had no problem
22 sealing anything in the public domain that related
23 to the terms of settlement or the amount of
24 settlement, but the fact that the District Court has
25 kept the -- the entire proceeding sealed from soup

1 to nuts I think mitigates for -- for some commentary
2 in resolution of that issue now, especially as you
3 pointed, Judge Walker.

4 The proceedings are open, and Lugosch and
5 its progeny command that when -- when matters go
6 into District Court, that they're open for the
7 record. And that is even in the NLRB decision from
8 two weeks ago that I mentioned that I'll submit as a
9 FRAP 28(j) letter, but it makes clear that the
10 confidentiality of arbitration ends when parties go
11 into District Court to litigate.

12 JUDGE LEE: All right. Thank you very
13 much. Thank you to both of you.

14 MR. ASHMORE: Thank you.

15 JUDGE LEE: We will take this case under
16 advisement as well.

17 MR. BLOOM: Thank you, Your Honor.

18 (WHEREUPON, the proceedings concluded.)
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CERTIFICATE

I, Michelle Breezee, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 25th day of March, 2026.



Michelle Breezee