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Issue Date: 21 March 2011

CASE NO.: 2007-SOX-00083

In the Matter of:

ASHWIN ABHYANKAR,
Complainant,

vs.

COUNTRYWIDE FINANCIAL CORP.,
Respondent.

ORDER DISMISSING COMPLAINT

This matter arises out of a retaliation complaint filed by Ashwin Abhyankar ("Complainant") who alleges that his former employer, Countrywide Financial Corporation ("Respondent"), violated the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, *et seq.*, ("Sarbanes-Oxley" or "SOX"), by terminating his employment in retaliation for making complaints to his superiors concerning accounting inconsistencies and preferential treatment of financial consultants.

For the reasons set forth below, the Complainant's complaint is DISMISSED.

PROCEDURAL BACKGROUND

The Complainant began working for the Respondent in April 2002 as a financial analyst.[1] After being laid off from his position in April 2006, he filed a retaliation complaint with the U.S. Department of Labor's Occupational Health and Safety Administration ("OSHA") in or around July 2006. Having retained an attorney, he also contemplated additional legal action in the judicial system concerning potential claims of race and national origin discrimination, and wage and hour violations.

Pending completion of OSHA's investigation, the Complainant entered into a stipulation with the Respondent to arbitrate all of his claims before the Judicial Arbitration & Mediation Services ("JAMS"), pursuant to an arbitration agreement executed between the Complainant and

[1] Any facts restated in this Order are not the product of a full and fair hearing before me, are based on excerpted evidentiary exhibits and the parties' pleadings, and should not be entitled to deference in any subsequent order or proceeding.

the Respondent as part of the Complainant's employment contract ("Arbitration Agreement").[2] On April 9, 2007, the Complainant filed a demand for arbitration with JAMS, alleging individual claims under SOX, individual claims of race and national origin discrimination, and individual and class claims of wage and hour violations. (Decl. of Jason D. Glenn, ¶ 5.)

On July 24, 2007, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, issued a preliminary order concerning the Complainant's SOX complaint, finding that the Complainant had failed to engage in any activity protected by SOX, and dismissing the complaint. On August 20, 2007, the Complainant contested this preliminary order, requesting a hearing before an administrative law judge, and the matter was referred by OSHA to the Office of Administrative Law Judges ("OALJ") for formal hearing. The matter was initially set for a hearing before me on December 4, 2007, and later continued by joint request of the parties until February 5, 2008.

On September 14, 2007, the Respondent mailed the Complainant's counsel a letter indicating the Respondent's belief that it was improper, in light of the Arbitration Agreement and the Complainant's submission of his SOX claim to JAMS, for the Complainant to also continue to pursue his SOX claim within the administrative system before the OALJ. (Glenn Decl., ¶ 8; RX F.[3]) The letter informed the Complainant of the Respondent's intent to file a Motion to Compel Arbitration of the Complainant's SOX complaint if he did not withdraw his administrative complaint pending before the OALJ. On September 21, 2007, the Complainant responded to this letter, indicating his intent to continue to pursue his SOX claim within the administrative system. (Glenn Decl., ¶ 9; RX G.) On October 29, 2007, the Respondent filed its "Petition to Compel Arbitration and to Stay or Dismissal [sic] DOL Administrative Proceedings Pending Arbitration" ("Motion to Compel Arbitration"). The Complainant submitted a reply brief, and both parties submitted supplemental briefings.

On January 22, 2008, I issued an Order granting the Respondent's motion to compel arbitration, and staying the OALJ proceeding pending completion of the arbitration, as required by the Federal Arbitration Act, at 9 U.S.C. § 3. I ordered the parties to submit periodic status reports as to the progress of the arbitration, as well as a final report informing me of the outcome of the arbitration, and a motion to dismiss the OALJ proceeding no later than 15 days after the arbitration award was entered.

Once submitted to arbitration with JAMS, the Complainant's individual and class claims were bifurcated, and the JAMS arbitrator, retired judge Richard Neal ("Arbitrator"), held a hearing on the Complainant's individual claims from May 4 to 5, 2009, and continuing from August 24 to 27, 2009. (Glenn Decl., ¶ 12; RX J.)

On November 21, 2009, the Arbitrator finalized an Interim Award, "issued following a plenary hearing on [the Complainant's] individual claims only," finding that the Complainant did not establish a violation of SOX. (RX J.) The Arbitrator found, *inter alia,* that "[b]ecause

[2] The Respondent attached to its November 22, 2010, Brief (discussed below) a copy of the Arbitration Agreement as its "Exhibit A."

[3] Exhibits submitted with the parties' briefs on November 22, 2010 (discussed below) will be referred to as Respondent's Exhibits ("RX") and Complainant's Exhibits ("CX").

claimant did not report on conduct an objectively reasonable person would believe to be a violation of SOX, he did not engage in protected activity, and thus fails to establish a prima facie whistle blowing claim." (RX J, p. 9.) The Interim Award provided for "further proceedings," including submission of briefs by the parties on the following questions: whether monetary sanctions should be imposed on the Respondent due to "significant difficulties and delays [the Complainant experienced] in obtaining discovery responses from respondent;" and whether, in light of the fact that the "class action portion of the case remains to be resolved," the "present award" concerning the Complainant's individual claims should "remain simply an interim award, or . . . take the form of a Partial Final Award." (RX J, pp. 11-12.) The Interim Award stated that it was "not intended to be subject to confirmation." (RX J, p. 13.)

The Arbitrator did not issue the Interim Award until February 2010, due to a delay in payment of his fees. (RX K, p. 1.) Following issuance of the Interim Award, the parties mediated for several months "in an attempt to reach a global resolution" of the Complainant's individual and class claims, but mediation efforts failed. (Glenn Decl., ¶ 14.)

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act"), H.R. 4173, was signed into law. Section 922 of the Act amended the employee protection provisions of Section 806 of Sarbanes-Oxley, 18 U.S.C. § 1514A, to provide the following additional subsection:

> (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.

18 U.S.C. § 1514A(e), *as amended*, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010). The law went into effect "1 day after the date of the enactment of this Act," on July 22, 2010. Pub. L. No. 111-203, § 4.

On August 4, 2010, the Complainant filed an 80-page Motion to Correct, challenging nearly all of the arbitrator's findings of fact and conclusions of law. (Glenn Decl., ¶ 15; RX K, p. 1.) On September 17, 2010, the Arbitrator issued an Order denying the Complainant's Motion to Correct, on the basis that the arbitration rules did not authorize a rehearing, and moreover the Interim Award contained a "detailed explanation of the arbitrator's findings on the evidence, the credibility of the witnesses, and the law," and the arbitrator "remain[ed] convinced that the Interim Award is correct." (RX K, p. 2.) The Order noted that the issues of possible monetary discovery sanctions and the class claims remained to be addressed, and instructed the parties to agree upon a schedule to resolve these two remaining issues. The Order concluded, "In the meantime, the arbitrator will promptly issue the Interim Award in the form of a Partial Final Award finally disposing of the individual claims." (RX J, p. 3.)

On October 29, 2010, I received the parties' Joint Status Report informing me that a partial final award had been issued by the arbitrator.[4] On November 1, 2010, I issued an order requiring the parties to submit briefs addressing the question of whether the Complainant retained any entitlement to a hearing before the OALJ on his Sarbanes-Oxley claim. On November 22, 2010, both parties timely submitted briefs, declarations, and exhibits in support of their respective positions.[5]

The Complainant argues in his Brief that his SOX claim should proceed to a *de novo* hearing before an ALJ and provides a number of theories to support his position. First, he argues that in July 2010, "before completion of arbitration and before issuance of [an] arbitration award challengeable in court or before the DOL," Sarbanes-Oxley was amended to "*expressly* provide[] that the right to a hearing before the DOL may *not* be waived, and that *no* pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of a SOX retaliation claim." (Complainant's Brief, pp. 1, 16-17 (emphasis in original).) Second, he argues that the Respondent waived its right to arbitrate his SOX claim in two fashions, first by delaying 16 months to move to compel arbitration of the SOX claim, and also by arguing in its post-arbitration brief that the OSHA investigation results were relevant and admissible evidence. (Complainant's Brief, pp. 2, 17-18.) Third, he argues that the Arbitrator's determinations are not binding on the OALJ, and that he retains the right to appeal to a court errors of law in the determination. (Complainant's Brief, p. 2.) He concludes that the arbitrator's award should be rejected on the merits, because it was factually and legally erroneous, failed to apply controlling Ninth Circuit law, and was improperly limited to an incomplete factual record. (Complainant's Brief, pp. 3-4, 18-29.) He submits that to grant his claim a *de novo* hearing before an ALJ would "promote justice and the public policy behind SOX." (Complainant's Brief, p. 6 n.1.)

In contrast, the Respondent argues that the Complainant is not entitled to a new hearing before the OALJ, as the Dodd-Frank Act was not intended by Congress to have retroactive application, his claim was "fully and fairly litigated and adjudicated in arbitration," and the arbitrator's determination now "has preclusive effect in this forum." (Respondent's Brief, p. 2.) The Respondent submits that I should now dismiss the Complainant's claim for three reasons: (1) res judicata and collateral estoppel bar rehearing of the SOX claim; (2) the Complainant willingly signed the Arbitration Agreement, which has previously been deemed enforceable in this case, and voluntarily agreed to arbitration of his SOX claims; and (3) federal law favors arbitration, and to permit a new hearing on the merits after the conclusion of arbitration would undermine the "integrity of the arbitration process." (Respondent's Brief, p. 5.) On March 16, 2011, I received an additional submission from the Respondent, directing my attention to *Riddle v. Dyncorp International, et al.*, 733 F. Supp. 2d 743 (N.D. Tex. 2010), a further authority in support of the Respondent's position that the Dodd-Frank Act may not be applied retroactively.

[4] The Complainant represents that, due to the Respondent' delay in payment of the Arbitrator, the Partial Final Award had not been formally issued by the Arbitrator by the time briefs were submitted on November 22, 2010. (Decl. of I. Benjamin Blady, ¶ 2.)

[5] The Complainant's exhibits are listed numerically, while the Respondent's exhibits are listed alphabetically. I will refer to the 17 exhibits attached to the Complainant's Brief as CX 1 through CX 17. I will refer to the 11 exhibits attached to the Respondent's Brief as RX A through RX K.

ANALYSIS AND FINDINGS

Retroactivity of Section 922 of the Dodd-Frank Act

The Respondent argues that the Dodd-Frank Act has no bearing on the current matter.[6] The Respondent cites the U.S. Supreme Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), for the proposition that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result," and argues that because the Dodd-Frank Act is "silent on the issue of retroactivity[,] [c]onsequently, it does not apply to this case." (Respondent's Brief, p. 10 (citing *Bowen*, 488 U.S. at 208).) Moreover, the Respondent argues that in the Federal Arbitration Act, Congress codified a strong national policy in favor of arbitration that courts have applied broadly to indicate that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The Respondent urges that given the lack of a clear retroactivity provision in the Dodd-Frank Act, the question of whether arbitration is a proper forum for the Complainant's SOX claim must be analyzed under the former law, which, the Respondent notes, is the law that was in effect at the time of my Order compelling arbitration in this case. The Respondent concludes, "[g]iven the favored status of arbitration and Congress's [previous] explicit rejection of a provision in SOX that would have prohibited the arbitration of SOX claims, it is plain that the arbitration of Abhyankar's SOX claims was proper and should not be disturbed." (Respondent's Brief, p. 12.)

The Complainant, in turn, argues that the current, amended version of SOX should be applied to determine if he "has the present right to proceed before the DOL, as SOX changes the forum to hear the case, confers jurisdiction to the DOL, and ousts the arbitrator of any jurisdiction." (Complainant's Brief, p. 16.) The Complainant cites to the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), where the court noted its approval of applying new jurisdictional statutes retroactively, insofar as

> Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." . . . Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties."

[6] Page 10 of the Respondent's Brief states the following in a footnote: "If Abhyankar raises the Dodd-Frank Act as a basis for finding that arbitration is not a proper forum for his SOX claim, Countrywide respectfully requests the opportunity to respond in full in a separate brief." (Respondent's Brief, p. 10 n.2.) After inserting this footnote, however, the Respondent proceeded to provide 3 pages of argument on the Dodd-Frank Act issue in its 13-page brief. Moreover, after receiving the Complainant's Brief in late November 2010, in which the Complainant clearly raised the Dodd-Frank Act amendments to Sarbanes-Oxley as the first basis upon which he should be entitled to proceed to a hearing before the OALJ, the Respondent neglected to finalize the request by submitting a motion for further briefing or a reply brief in the months that followed. The only further submission I have received from the Respondent is a "Citation to New Authority In Support of Respondent's Statement of Position Re: Dismissal of Proceeding," received March 16, 2011, in which the Respondent pointed out an additional federal court opinion standing for the proposition that the Dodd-Frank Act was not intended to have retroactive effect. Because the Respondent has already devoted approximately one quarter of its Brief to this issue, and has neglected to submit a final request for further briefing, I will not entertain its footnoted request at this time, and will decide this issue on the basis of the parties' present submissions.

Landgraf, 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U. S. 506, 508-509 (1916), and *Republic Nat. Bank of Miami v. U.S.*, 506 U. S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in judgment)) (internal citations omitted). The Complainant quotes my Order compelling arbitration, where I noted that requiring the Complainant to submit his SOX claim to arbitration would not deprive him of "substantive rights afforded by the statute," and required him merely to "submit[] to their resolution in an arbitral, rather than judicial, forum." (Complainant's Brief, p. 17 (quoting Order Granting Motion to Compel Arbitration and Vacating Hearing, Jan. 22, 2008).) Accordingly, per the Complainant's theory, the rule discussed in *Landgraf* permits retroactive application of Section 922 of the Dodd-Frank Act — a jurisdictional provision — which should grant him the present right to proceed with his SOX claim before the OALJ.

Section 922 of the Dodd-Frank Act Carries Retroactive Effect

The retroactivity of the bar on arbitration agreements contained in Section 922 of the Dodd-Frank Act has recently been analyzed in a federal judicial forum, in a case in which an employer's motion to compel arbitration of a pending SOX complaint was still under advisement by the court when the Dodd-Frank Act went into effect in July 2010. In *Pezza v. Investors Capital Corporation, et al.*, --- F. Supp.2d ---- (D. Mass. Mar. 1, 2011), the U.S. District Court for the District of Massachusetts noted the Supreme Court's recognition of an "apparent tension" between "two seemingly contradictory statements found in [its] decisions concerning the effect of intervening changes in the law." *Pezza*, 2011 WL 767982, at *2 (quoting *Landgraf*, 511 U.S. at 263-64). Namely, courts must, on one hand, "apply the law in effect at the time [they] render[] [their] decision," *Landgraf*, 511 U.S. at 264 (quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974)), but on the other hand, because "[r]etroactivity is not favored in the law," courts should not construe "congressional enactments and administrative rules . . . to have retroactive effect unless their language requires this result." *Landgraf*, 511 U.S. at 264 (quoting *Bowen*, 488 U.S. at 208) (alteration in original). In determining whether Section 922 may be applied retroactively to its pending SOX complaint, the *Pezza* court applied the framework enunciated by the Supreme Court in *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30 (2006):

> We first look to whether Congress has expressly prescribed the statute's proper reach, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying our normal rules of construction. If that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment. If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the absence of a clear indication from Congress that it intended such a result.

Pezza, 2011 WL 767982, at *2 (quoting *Fernandez-Vargas*, 548 U.S. at 37-38 (internal quotation marks, citations, and alterations omitted)).

Applying the first prong of this framework, the *Pezza* court first determined that Congressional intent as to the retroactive application of Section 922 of the Dodd-Frank Act is unclear, as the section contains no express retroactivity language, and no other provisions of the Dodd Frank Act relating to arbitration agreements clarify Congress's intent, per the normal rules of statutory construction. *Id.* at *2-6.

Applying the second prong of the *Fernandez-Vargas* framework, the court considered whether retroactive application of Section 922 would impermissibly "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at *6 (quoting *Landgraf*, 511 U.S. at 280). The court noted that the Supreme Court has repeatedly ruled that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at *7 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). From this premise, the court reasoned that, although Section 922's ban on arbitration agreements does bear some relationship to the parties' contractual rights, Section 922 "principally concerns" jurisdiction, rather than substantive contractual rights. *Id.* As such, the court reasoned, it falls into the category of "jurisdictional statutes," which the Supreme Court has ruled may be applied retroactively insofar as such statutes "speak to the power of the court rather than to the rights or obligations of the parties," and "take[] away no substantive right but simply change[] the tribunal that is to hear the case." *Id.* at *7-8 (quoting *Landgraf*, 511 U.S. at 274, and *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006)). The court concluded, "the parties do not claim that a different substantive result will obtain merely because Pezza's claim will be heard by a court rather than by [an arbitration] panel. Consequently, I conclude that Section 922 of the Act should also be applied to conduct that arose *prior* to its enactment." *Id.* at *8.

Although decisions of the U.S. District Court for the District of Massachusetts hold no controlling authority here, I nonetheless concur with the entirety of that court's reasoning and the conclusions it reached in *Pezza*. I am not persuaded, meanwhile, by the reasoning of the Northern District of Texas in the supplemental case submitted by the Respondent, as that case limited its analysis to Section 4 of the Dodd-Frank Act — providing simply that the law as a whole would go into effect one day after its enactment — without engaging in any analysis of Congress's intent with regard to the retroactivity of specific provisions of the Act, which amended a variety of distinct federal laws. *Riddle v. Dyncorp International, et al.*, 733 F. Supp. 2d 743, 747-48 (N.D. Tex. 2010) (granting employer's motion to dismiss whistleblower claim under False Claims Act as untimely filed, and rejecting plaintiff's argument that the Dodd-Frank Act's extension of the statute of limitations should be applied retroactively to render his complaint timely). The Supreme Court in *Landgraf* expressly instructed that, where Congress fails to provide explicit guiding instructions concerning retroactivity, it is insufficient to rely upon the general statement "that the provisions are to 'take effect upon enactment.'" *Landgraf*, 511 U.S. at 280. The Court instructed,

> [T]here is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes. To the contrary, we understand the instruction that the provisions are to "take effect upon enactment" to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and

preenactment conduct.

Id. As the *Pezza* court pointed out, moreover, the diverse provisions of the Dodd-Frank Act involve a variety of distinct temporal applications — to future claims, claims after specific set dates, and, at least *arguably* to retroactive claims as well — and as a result, the *Pezza* court concluded that the intent of Congress relative to the retroactivity of the Act's individual provisions was "far from clear." *Pezza*, 2011 WL 767982, at *6. Given this lack of clarity, the *Pezza* court correctly noted its obligation under Supreme Court jurisprudence to apply the remainder of the *Fernandez-Vargas* framework, determining whether the statute affected substantive rights or merely the jurisdiction to hear the case. The *Riddle* court, meanwhile, went no further than the law's stated effective date, which was an over-simplification of the analysis required under *Landgraf* and *Fernandez-Vargas*.

If the motion currently pending before me were the Respondent's Motion to Compel Arbitration, I would rule as the *Pezza* court has done, rejecting the Respondent's request to compel the Complainant to arbitrate his SOX claim, in view of the enactment of Section 922 of the Dodd-Frank Act — a jurisdictional statute with permissible retroactive application in appropriate cases.

However, the procedural posture of *Pezza* is clearly distinguishable from the case before me today. In *Pezza*, the disputed arbitration had not yet occurred, while here, the arbitration of the Complainant's SOX claim has already taken place and an interim decision had already been issued. As a matter of fact, if the arbitrator had been promptly paid, there is a distinct possibility that a final decision on this issue might have been issued before the Dodd-Frank Act was signed into law. This distinction is clearly significant, and necessitates further analysis.

Section 922 Does Not Invite Relitigation of Previously Arbitrated SOX Claims

In ruling that new jurisdictional or procedural laws may be applied retroactively in appropriate cases, the Supreme Court has been careful to explain that this does not equate to a holding that previously litigated cases may be retried under the new rules. In *Landgraf*, the Court noted,

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect *the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case*.

Landgraf, 511 U.S. at 275 n.29 (emphasis added); *see also id.* at 281 n.34 ("As the Court of Appeals recognized . . . the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge. . . . Thus, customary practice would not support remand for a jury trial in this case.").

A long series of federal decisions have relied upon this provision of *Landgraf* for the proposition that the retroactive application of a new rule or statute depends upon the procedural

posture of a case, and must take into consideration whether a final decision was already issued under the previous rules, prior to the new rule's enactment. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (citing *Landgraf* and noting that new rules of pleading and proof may be applied after the cause of action arises and after the old rules "have been applied in a case, but before final judgment has been entered"); *Valerio v. Crawford*, 306 F.3d 742, 766 (9th Cir. 2002) (rejecting criminal defendant's request to apply expanded habeas certification rule where "the district court's order denying [certification] was entered before the effective date of the Rule"); *Shipes v. Trinity Indus.*, 31 F.3d 347, 347-48 (5th Cir. 1994) (applying *Landgraf* and refusing to retroactively apply new expert witness fee rules applicable at trial court level in case already decided by trial court when new law was enacted); *S&D Trading Academy, LLC v. AAFIS Inc.*, 336 Fed. Appx. 443, 452 (5th Cir. 2009) (refusing to retroactively apply new deposition fee rules applicable at trial court level in case already decided by trial court when new rule was enacted); *Cruse v. Comm'r of Social Sec.*, 502 F.3d 532, 541-42 (6th Cir. 2007) (refusing to apply new medical evidence rule to Social Security case where final administrative decision was issued two years prior to date new rule became effective); *U.S. v. Ballares*, 317 Fed. Appx. 36, 38 (2d Cir. 2008) (applying amended Federal Rule of Criminal Procedure 59 because the amendment became effective after the defendant pled guilty, but "before the matter was referred to the magistrate" for hearing and decision).

Rulings of this nature rest upon a related rule that the Supreme Court has emphasized: merely because a statute may be termed "jurisdictional" does not mean that it may not *also* affect the substantive rights of the parties, such that its retroactive application would be impermissible. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (finding that an amendment creating jurisdiction where none previously existed "speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to [the] presumption against retroactivity as any other.") As discussed above, a statute has impermissible retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. The *Landgraf* court further explained that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining retroactive effect. *Id.* at 270 (quoted in *Scott v. Boos*, 215 F.3d 940, 944 (9th Cir. 2000)); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002).

The Supreme Court has held that concerns over "settled expectations" relative to "transactions already completed" are not limited to the allegedly illegal "transactions" which brought about the claim to begin with, but can also include the parties' reasonable procedural expectations developed in the course of litigating a case. In *Landgraf*, the Court rejected the argument that because a statutory amendment authorizing compensatory damages did not create a new underlying cause of action, it necessarily did not "impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280-81. The court noted that the new provision "does not make unlawful conduct that was lawful when it occurred," but "[n]onetheless, the new compensatory damages provision would operate 'retrospectively' if it were applied to conduct occurring before" its effective date. *Id.; see also Hughes*, 520 U.S. at 946-48 (rejecting argument that merely because an amendment deleting a defense to the False Claims Act did not add a new cause of action or increase monetary liability, it did not "impose new duties with respect to transactions already completed"); *Rivers v. Roadway Express, Inc.*,

511 U. S. 298, 303 (1994) (holding that an increase in monetary liability could not be applied retroactively even though the "normative scope of Title VII's prohibition on workplace discrimination" was not altered).

In *Elbert v. True Value Company*, 550 F.3d 690 (8th Cir. 2008), the U.S. Court of Appeals for the Eighth Circuit denied a whistleblower complainant's request to have his case relitigated in the district court after a new law, enacted after the case was fully litigated at the OALJ level, granted whistleblowers under the Surface Transportation Assistance Act ("STAA") the right to have their retaliation claims heard in district court if the Secretary of Labor did not issue its final decision within 210 days of filing the initial complaint. The court noted that the complaint was filed with OSHA in March 2005, the parties participated in discovery and motion practice and submitted to a six-day hearing before an administrative law judge in June 2005, and the judge issued a Recommended Decision and Order rejecting the complainant's claim on November 16, 2006, all of which took place before the August 2007 effective date of the rule change. *Elbert*, 550 F.3d at 691. Citing *Landgraf*, the court affirmed the district court's decision dismissing the complainant's request to relitigate the matter in district court, observing that the parties had already completed discovery, motion practice, and fully litigated their claim in a different forum, and that to require the parties to relitigate the claim years later would impose additional costs, and could be viewed as affecting the parties' substantive rights:

> We are . . . unpersuaded by Elbert's argument that True Value's substantive rights are not at risk since he is not seeking punitive damages in the district court. To permit Elbert to relitigate his claims in the district court when the parties have already engaged in discovery and motion practice in his administrative case would result in additional costs to True Value.

Elbert, 550 F.3d at 693 (citing *Martin v. Hadix*, 527 U.S. 343, 360 (1999) (when work has been done before statute became effective, imposition of new standards could upset reasonable expectations of parties who may have proceeded on assumption that prior statute was in effect)).

Here, I am persuaded that the Respondent has a viable claim that it possesses "settled expectations" and a "reasonable reliance" interest in transactions that have already been completed in this case, which would render retroactive application of Section 922 to this case an abridgement of the Respondent's substantive rights. I issued an Order on January 22, 2008, ruling that the arbitration was required in this case per the parties' Arbitration Agreement and relevant provisions of controlling federal law. Pursuant to my Order, the parties subsequently spent more than 1 ½ years participating in negotiation, motion practice, discovery, and litigation of this case, which was ultimately submitted to six full days of hearing before the Arbitrator in the Spring and Summer of 2009. In February 2010, more than two years after my Order was issued, and prior to the enactment of the Dodd-Frank Act, the parties received a determination from the Arbitrator disposing of the Complainant's individual SOX claim in its entirety. All costs associated with the arbitration proceeding were paid for by the Respondent. Although the Arbitrator waited to issue his determination in the form of a "final" award until other aspects of the Complainant's various claims could be determined, the Arbitrator's determination as to the SOX claim was rendered as of February 2010, before enactment of the Dodd-Frank Act. The distinctions between the Interim Award issued in February 2010 and the Partial Final Award issued after enactment of the Dodd-Frank Act were clearly ministerial rather than substantive —

as evidenced by the Arbitrator's later refusal to adjust his reasoning or conclusions following an 80-page appeal by the Complainant — and are insufficient to disturb a finding that the Arbitrator's final decision on the merits of the SOX claim was finally rendered prior to enactment of the Dodd-Frank Act.

Accordingly, I am persuaded, in keeping with the Supreme Court's guidance in *Landgraf* and its progeny, that retroactive application of Section 922 of the Dodd-Frank Act to grant the Complainant the right to relitigate his previously arbitrated SOX claim would carry an impermissible retroactive effect in this case. As such, the Complainant's previously stayed SOX claim must now be DISMISSED.[7]

Moreover, the Complainant's remaining theories are inadequate to support rehearing of his SOX claim.

1. The Respondent Has Not Waived Its Right to Arbitrate the SOX Claim

As noted above, the Complainant additionally argues that the Respondent waived its right to arbitrate the SOX claim in two fashions, first by delaying 16 months to move to compel arbitration, and also by arguing in its post-arbitration brief that the OSHA investigation results were relevant and admissible evidence. He suggests that the arbitrator's apparent reliance on OSHA's preliminary findings had the effect of denying him the *de novo* review of those findings to which he was entitled, and that these considerations entitle him to a *de novo* hearing of his SOX claim before the OALJ.

These arguments are without merit. As I have previously determined in this case (*see* Order Compelling Arbitration (Jan. 22, 2008), p. 5), the Respondent did not waive its right to pursue arbitration based on the date it submitted its Motion to Compel Arbitration. The procedural chronology of this case, restated above, reveals that the substantial delay the Complainant finds objectionable was due to the length of time it took OSHA to complete its investigation and issue its preliminary findings. The OSHA investigation was not completed until July 24, 2007, approximately one year after the Complainant filed his initial complaint. I do not find it unreasonable for an employer to permit an initial government investigation of a dispute to take its course, on the taxpayer's dime, and wait to see if a full hearing on a claim is ever going to be necessary, before seeking to enforce an arbitration agreement as to the claim under investigation. Understandably, the Respondent may have believed that the OSHA investigation could resolve the SOX claim once and for all, after which no arbitration or formal hearing of the SOX claim would ever be necessary. I find specious the Complainant's theory that the Respondent's acceptance of OSHA's publicly available procedures, which the Complainant himself initiated, constituted a "substantial utiliz[ation of] the litigation machinery" to strategically prejudice the Complainant. *Mozingo v. S. Fin. Group*, 520 F. Supp. 2d 725, 729 (D.S.C. 2007).

[7] As noted above, the Respondent additionally contends that the doctrines of *res judicata* and collateral estoppel also operate to bar relitigation of the Complainant's SOX claim. Because I have determined the Complainant's SOX claim must be dismissed on other grounds, it is unnecessary for me to address this argument.

Once OSHA's investigation was completed, and the Complainant requested a full hearing on the merits before an administrative law judge on August 20, 2007, the Respondent was guilty of no significant delays in pursuing arbitration. On September 14, 2007, less than one month after the Complainant requested a full hearing, the Respondent contacted the Complainant to inform him that it intended to submit a Motion to Compel Arbitration if the Complainant did not withdraw his administrative SOX complaint. (RX F.) After the Complainant responded to this contact on September 21, 2007, the Respondent waited only slightly over one month before filing its Motion to Compel Arbitration. This swift response time is clearly insufficient to support the Complainant's waiver theory.[8]

I am additionally unpersuaded by the theory that the Respondent's reference to the findings of OSHA in its post-arbitration brief constitutes a waiver of its right to the arbitration. On page 8 of its closing arbitration brief, the Respondent restated OSHA's findings of no protected activity, noted that the Respondent's position was "consistent with the finding[s] of the Department of Labor," and added in a footnote that, "[a]s a general rule, administrative agency reports and findings are deemed to be both relevant and admissible. . . . [and], while not binding on the trier of fact, are generally admissible as probative evidence." (CX 3, p. 5.) I find nothing objectionable in these statements by the Respondent. The findings of OSHA are admissible evidence in later proceedings — indeed, in OALJ proceedings, OSHA's determination letter is the first document automatically entered into a whistleblower's case file. *See* 29 C.F.R. § 1980.105(b) (providing that "a copy of the original [SOX] complaint and a copy of the findings and order" of OSHA will be "file[d] with the Chief Administrative Law Judge, U.S. Department of Labor."); *see also id.* at § 1980.107(d) (in SOX hearings before the OALJ "formal rules of evidence will not apply."). Moreover, the Respondent correctly cautioned that, while admissible, the findings are not binding on the trier of fact. I perceive no error or prejudice to the Complainant in such statements.

The Arbitrator's reference to OSHA's findings in his Interim Award is similarly unobjectionable. After concluding that the Complainant did not engage in activity protected under SOX, the Arbitrator noted that he "reaches this conclusion independently, based on the

[8] The Complainant argues that my failure to address the District of South Carolina's decision in *Mozingo* in my January 22, 2008, Order resulted in an inadequate dismissal of his arbitration waiver theory. I neglected to discuss the *Mozingo* opinion in my January 2008 Order for the simple reason that it provides no support for the Complainant's waiver argument. In that case, the court determined that a SOX complainant had abused the litigation processes, resulting in an eight month delay and great expense to his former employer, after the complainant engaged in the following series of steps: (1) he first waited for an initial determination of his SOX complaint from OSHA; (2) after OSHA dismissed his complaint, he filed a request for a hearing before an ALJ; (3) after the ALJ issued a summary decision order dismissing his complaint on the merits, he filed an appeal to the Administrative Review Board ("ARB"); (4) pending the ARB's consideration of the case, he filed a fresh suit in the district court; (5) after receiving the employer's motion to dismiss the district court suit for failure to state a claim and lack of jurisdiction, the complainant filed a motion to stay the federal suit and refer the matter to arbitration. *Mozingo*, 520 F. Supp. 2d at 728. The court determined that the delay and expense to the employer — which had been obligated to file four merits briefs before four separate forums before the complainant requested arbitration — was sufficient to constitute prejudice against the employer. *Id.* at 731-32. *Mozingo* is clearly distinguishable from the present case, as it involved a complainant's strategic exhaustion of every available litigation forum, including two unfavorable decisions on the merits, prior to requesting a fresh rehearing of his SOX claim before an arbitrator. Here, in contrast, the Respondent requested arbitration within less than one month after it learned that a full hearing on the merits of the SOX claim was going to be necessary.

facts and analysis presented above." (RX J, p. 9.) He then noted that the findings of OSHA quoted in his decision,

> [T]hough not binding in this proceeding, reinforce the conclusion that claimant did not engage in protected activity, and hence has no whistleblower claim. The DOL has particular expertise on these issues, and its officer reached precisely the same conclusion the arbitrator has reached after careful consideration of the evidence and the applicable legal rules.

(RX J, pp. 9-10.) The record clearly shows that the Arbitrator conducted a *de novo* review of the Complainant's SOX claim; he presided over six full days of hearing, observed a variety of witnesses presented by both parties, entered credibility findings concerning several of the key witnesses, and reviewed complex financial documents submitted by both sides. (*See generally* RX J; RX K.) The fact that he referred to the findings of OSHA in support of his independent determination does nothing to undermine the *de novo* quality of the review he conducted or the self-sufficiency of the factual and legal determinations he reached.

2. Errors of Fact or Law in Arbitrator's Determination Are Not Subject to My Review

Finally, the Complainant argues that the Arbitrator's determinations are not binding on the OALJ, and that he retains the right to appeal to a court errors of law in the determination. (Complainant's Brief, p. 2.) He argues that I should review and reject the Arbitrator's award on the merits, because it was factually and legally erroneous, failed to apply controlling Ninth Circuit law, and was improperly limited to an incomplete factual record. (Complainant's Brief, pp. 3-4, 18-29.)

The Complainant is correct that he retains the right to judicial review of the Arbitrator's final award; the Arbitration Agreement itself provides an express right of judicial review. (RX A, § 10 ("both parties shall have the right to appeal to an appropriate court with jurisdiction errors of law in the decision rendered by the arbitrator.").) The Agreement does not specify which court shall have jurisdiction over confirmation of arbitration awards entered, but provides that the "the Federal Arbitration Act shall govern the interpretation, enforcement, and all proceedings pursuant to this Agreement." (RX A, § 2.) The Federal Arbitration Act, in turn, provides that arbitration decisions are to be confirmed within the court identified by the parties in their arbitration agreement, or if the agreement is silent, in the U.S. District Court for the district in which the arbitration award was made, and that appeals of the arbitration award may also be taken in the district court. 9 U.S.C. §§ 9-10. Given these provisions, I am persuaded that the appropriate forum to entertain the Complainant's appeal of the final arbitration award is the appropriate U.S. District Court. The OALJ retains no jurisdiction to conduct the substantive review the Complainant seeks.

CONCLUSION

As determined at length above, Section 922 of the Dodd-Frank Act may not be applied retroactively in this case to annul the results of the arbitration of the Complainant's SOX claim or entitle the Complainant to a *de novo* rehearing of the claim before the OALJ. Moreover, the Respondent's conduct in the course of the litigation or arbitration did not serve to waive its right

to the arbitration. Finally, errors of fact or law allegedly committed by the Arbitrator are not subject to my review, and any appeals of the Arbitrator's determinations should be entertained by the appropriate U.S. District Court.

The Complainant's claim under Sarbanes-Oxley is DISMISSED.

SO ORDERED.

A

JENNIFER GEE
Administrative Law Judge

San Francisco, California