No. 06-4954-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LINDA C. GUYDEN,

Plaintiff-Appellant,

v.

AETNA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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INTEREST OF THE SECRETARY OF LABOR

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Secretary of Labor ("Secretary") submits this brief as amicus curiae. The Secretary, authorized by Congress to administer and enforce the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"), section 806, 18 U.S.C. 1514A, has a strong interest in assuring that SOX whistleblower claims are adjudicated fairly and expeditiously. As a matter of practice, the Department of Labor (the "Department") defers SOX complaints it receives to arbitration when it becomes aware that an employee who has filed

the complaint agreed to arbitrate his or her employment dispute, and the arbitration agreement will adequately protect the employee's interests under section 806. See August 9, 2002 Memorandum of Solicitor of Labor Eugene Scalia, available at http://www.dol.gov/sol/media/memos/August9.htm.

STATEMENT OF THE ISSUE

This case arises under section 806 of SOX, 18 U.S.C. 1514A, which authorizes the Department to investigate whistleblower complaints and, if it determines that a violation has occurred, to order relief -- including reinstatement, back pay, and compensation for any special damages sustained, including reasonable attorneys fees. SOX also permits employees to file an action in district court if the Department has not issued a final decision within 180 days. The issue presented is whether such a whistleblower action is subject to compulsory arbitration under an individual arbitration agreement.[1]

STATEMENT OF THE CASE

A. Procedural History and Statement of Facts[2]

Linda Guyden worked for Aetna, Inc. as the head of its Internal Audit Department. See Joint Appendix ("J.A.") 109

[1] This issue also is pending before the United States Court of Appeals for the Fifth Circuit in Green v. Service Corp. Int'l, No. 06-20732 (filed Aug. 30, 2006).

[2] This case was decided on a motion to compel arbitration; the record accordingly contains few facts. Only those facts relevant to the legal issue involved are set forth below.

(decision below). During the hiring process, she agreed in her application for employment and her offer letter to mandatory, binding arbitration of any employment-related legal dispute. See J.A. 45, 47. Subsequently, Guyden signed a Stock Option Grant Acknowledgement and Acceptance form and a Performance Unit Award Agreement that also required arbitration of employment-related disputes. See J.A. 58-61, 67-70, 72. All these signed documents contain the same arbitration provisions (collectively referred to as the "agreement").

Under the terms of the agreement, arbitration will be administered by the American Arbitration Association ("AAA") according to the AAA's National Rules for Dispute Resolution in effect at the time the request for arbitration is filed. J.A. 58.[3] The agreement provides that the arbitrator "shall have the authority to order the same remedies (but no others) as would be available in a court proceeding." The agreement also provides for "limited pre-hearing discovery," stating that:

[3] The current version of the relevant AAA rules, effective July 1, 2006, was renamed the "Employment Arbitration Rules and Mediation Procedures." See American Arbitration Association, Employment Arbitration Rules and Mediation Procedures ("AAA Rules"), R. 1, available at http://www.adr.org/sp.asp?id=28481#1. The provisions relevant here are identical to the previous National Rules for the Resolution of Employment Disputes, effective September 15, 2005. See AAA Rules, Summary of Changes (providing text of the National Rules for the Resolution of Employment Disputes), available at http://www.adr.org/sp.asp?id=22075.

> Each [party] may take the deposition of one person and anyone designated by the other as an expert witness. . . . Each party also has the right to submit one set of ten written questions . . . and to request and obtain all documents on which the other party relies in support of its answers to the written questions. Additional discovery may be permitted by the arbitrator upon a showing that it is necessary for that party to have a fair opportunity to present a claim or defense.

J.A. 59, 92. The agreement also contains a confidentiality provision providing that "[a]ll proceedings, including the arbitration hearing and decision, are private and confidential, unless otherwise required by law. Arbitration decisions may not be published or publicized without the consent of both the [Employee] and the Company." J.A. 59.

On February 22, 2005, Guyden filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Aetna had terminated her employment in violation of section 806 of SOX.[4] On October 24, 2005, before OSHA completed its investigation, Guyden filed a de novo SOX complaint in the United States District Court for the District of Connecticut.[5] Aetna moved to compel arbitration.

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[4] The Secretary has delegated responsibility for receiving and investigating whistleblower complaints under SOX to the Assistant Secretary for Occupational Safety and Health. See Secretary's Order 5-2002, 67 Fed. Reg. 65,008 (Oct. 22, 2002).

[5] Section 806 of SOX provides than an employee may file a de novo complaint in district court if the Department has not issued a final decision within 180 days of the filing of the initial complaint and there is no showing that the delay is due

While conceding that her SOX claim fell within the scope of her arbitration agreement, Guyden argued that the mandatory arbitration of SOX complaints conflicts with the underlying purposes of the statute's whistleblower protection provisions. J.A. 112. Guyden also argued that her arbitration agreement was deficient because it provided that the arbitrator's decision was to remain confidential and limited her ability to seek discovery. J.A. 112, 117. With regard to the discovery procedures, Guyden objected that the agreement limited her to taking only one deposition and that the arbitrator lacked authority to issue subpoenas to compel discovery. J.A. 118, 120.

On September 25, 2006, the district court granted Aetna's motion to compel arbitration and dismissed Guyden's complaint.

B. The District Court's Decision

The district court held that there is no inherent conflict between using the arbitral forum for SOX whistleblower claims and the purposes of the Act. Rejecting Guyden's public policy arguments against compulsory arbitration, the court recognized that federal courts have routinely upheld bargains to arbitrate statutory claims despite the plaintiff's role as a private attorney-general. J.A. 114-16.

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to the bad faith of the employee. See 18 U.S.C. 1514A(b)(1)(B); 29 C.F.R. 1980.114(a).

The court also held that the procedural restrictions under Guyden and Aetna's arbitration agreement did not invalidate Guyden's bargain to arbitrate. Specifically, the court rejected Guyden's contention that the requirement that the arbitrator's decision remain confidential conflicted with SOX's goal of eliminating the "corporate code of silence." J.A. 114.[6] The court concluded that even though the confidentiality provision may favor the employer, which will have access to any prior decisions of similar claims, it does not render the arbitration agreement invalid. The court noted that plaintiffs' lawyers and arbitration agencies "can scrutinize arbitration awards and accumulate a body of knowledge on a particular company," and that there are methods other than publication of arbitration decisions by which employees, shareholders, and investors can become aware of corporate misconduct. Thus, the court concluded that the confidentiality requirement was not so offensive as to render Guyden's arbitration agreement void. J.A. 117-18.

Finally, the district court concluded that limits placed on discovery in the arbitration agreement do not overcome the

[6] When enacting Title VIII of SOX, of which the section 806 whistleblower provisions are a part, Congress stated that the Enron scandal revealed "a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity." S. Rep. No. 107-146, at 5 (2002).

presumption of arbitrability, noting that the limits were identical for each party and the arbitrator had the discretion to allow further discovery. J.A. 115. With regard to the arbitrator's lack of subpoena power to compel nonparty witnesses to be deposed, the court stated that the arbitration agreement conferred sufficient powers upon an arbitrator to protect Guyden's rights, including permitting an arbitrator to compel the appearance of witnesses and the production of documents at a pre-merits hearing pursuant to section 7 of the Federal Arbitration Act. J.A. 115-16.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that SOX whistleblower complaints are subject to compulsory arbitration pursuant to an individual arbitration agreement. Statutory claims are presumed to be arbitrable unless the party opposing arbitration can demonstrate that Congress intended to preclude arbitration of the statutory rights in question. There is no evidence that Congress intended to preclude mandatory arbitration of section 806 whistleblower claims. Nothing in SOX or its legislative history precludes arbitration of whistleblower claims under the terms of an individual arbitration agreement. Indeed, Congress rejected a provision that would have barred the mandatory arbitration of section 806 claims. See S. 2010, 107th Cong. § 7 (2002); S. Rep. No. 107-

146, at 22. Furthermore, arbitration of a whistleblower complaint does not pose an inherent conflict with SOX's statutory purposes. SOX's remedial and deterrent purposes will not be undermined by compulsory arbitration because all the civil remedies that Congress established to encourage and protect SOX whistleblowers can be provided effectively through arbitration.

The district court also correctly concluded that Guyden's arbitration agreement was valid despite its confidentiality provision and limitations on discovery, and the fact that arbitrators may lack subpoena authority to compel discovery. The circuit courts that have considered the issue have overwhelmingly held that a confidentiality provision does not render an arbitration agreement unenforceable. See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004). Moreover, courts have repeatedly held that discovery restrictions are not a bar to arbitration. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). It is noteworthy that Congress entrusted the enforcement of SOX whistleblower complaints to the Department of Labor in the first instance, and the Department's administrative law judges lack subpoena authority under SOX and have the discretion to limit discovery to expedite their hearings.

ARGUMENT

THE MANDATORY ARBITRATION OF A WHISTLEBLOWER COMPLAINT UNDER SECTION 806 OF SOX DOES NOT CONFLICT WITH THE ACT'S UNDERLYING PURPOSES

A. Statutory and Regulatory Framework of SOX

SOX, which was enacted in the wake of the Enron and WorldCom scandals to restore investor confidence in the nation's financial markets by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing, provides whistleblower protection to employees of publicly traded companies who report corporate misconduct. See 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies."). Section 806 specifically prohibits publicly traded companies from discriminating against an employee in the terms and conditions of employment because of his or her whistleblowing activity. See 18 U.S.C. 1514A(a). Activities protected under the Act include providing to a federal regulatory or law enforcement agency, Congress, or "a person with supervisory authority over the employee" information that an employee reasonably believes constitutes a violation of federal mail, wire, bank, or securities fraud (18 U.S.C. 1341, 1343, 1344, and 1348), or a violation of any securities rule or

other provision of federal law relating to fraud against shareholders. See 18 U.S.C. 1514A(a)(1), (a)(2).

An employee who believes that he or she has been subject to retaliation for protected activity may file a complaint with OSHA. See 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103. If OSHA determines that there is reasonable cause to believe that a complaint has merit, it will issue findings and a preliminary order of relief. See 49 U.S.C. 42121(b)(1), (b)(2)(A); 29 C.F.R. 1980.103-.105.[7] An employee prevailing in a section 806 action is entitled to "make-whole" relief, including reinstatement, back pay, and compensation for any special damages sustained as a result of the retaliation, including reasonable attorneys fees. See 18 U.S.C. 1514A(c).

Either the employee or the employer may object to OSHA's findings by requesting a de novo hearing before an administrative law judge ("ALJ"). See 29 C.F.R. 1980.107. ALJ decisions are subject to discretionary review by the Department's Administrative Review Board ("ARB").[8] SOX also

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[7] Section 806 incorporates the procedures, as well as the burdens of proof, of the whistleblower protection provisions contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. See 18 U.S.C. 1514A(b)(2)(A), (b)(2)(C) (incorporating 49 U.S.C. 42121(b)).

[8] The Secretary has delegated to the ARB responsibility for issuing final agency decisions under section 806. See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

provides that an employee may file a de novo complaint in district court if the Department has not issued a final decision within 180 days of the filing of the initial complaint and there is no showing that the delay is due to the bad faith of the employee. See 18 U.S.C. 1514A(b)(1)(B); 29 C.F.R. 1980.114(a).

B. The Arbitration of Whistleblower Claims Under Section 806 Does Not Conflict with the Act's Purposes

The district court properly concluded that there is no conflict between arbitrating a section 806 claim under the terms of an individual arbitration agreement and the purposes of SOX.[9] In the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 et seq., Congress codified a strong national policy in favor of arbitration that the courts have applied broadly. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); McMahan Sec. Co. L.P. v. Forum Capital Mkts. L.P., 35 F.3d 82, 88 (2d Cir. 1994) (arbitration applies unless the arbitration clause does not cover the asserted dispute); S.A. Mineracao da Tridade-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 194 (2d Cir. 1984) (courts should "construe arbitration clauses as broadly as possible"). As a result, statutory claims are presumed to be arbitrable

[9] A decision to compel arbitration is reviewed de novo. See Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel, 346 F.3d 360, 364 (2d Cir. 2003).

unless it can be demonstrated that Congress precluded waiver of judicial remedies for the statutory rights in question. See Gilmer, 500 U.S. at 26; Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987); Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 78 (2d Cir. 1998). "'[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" Gilmer, 500 U.S. at 28 (alterations in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)). The party opposing arbitration bears the burden of demonstrating Congress's intent to preclude it. See McMahon, 482 U.S. at 227; Oldroyd, 134 F.3d at 78.

There is no demonstrable congressional intent to preclude arbitration of section 806 claims. Such congressional intent may be manifest in the statute, its legislative history, or an "inherent conflict" between arbitration and the statutory purpose. See Gilmer, 500 U.S. at 26. Nothing in SOX or its legislative history precludes the mandatory arbitration of whistleblower claims. To the contrary, the history of SOX's enactment reveals that Congress rejected a provision that would have barred the mandatory arbitration of SOX whistleblower claims. See S. 2010, 107th Cong. § 7 (2002); S. Rep. No. 107-146, at 22; see also Boss v. Salomon Smith Barney, Inc., 263 F.

Supp. 2d 684, 685 (S.D.N.Y. 2003) (SOX whistleblower complaint is subject to mandatory arbitration).

Moreover, there is no inherent conflict between the purposes of SOX and the arbitration, pursuant to an individual arbitration agreement, of section 806 claims. By enacting SOX, Congress intended "to improve the quality of and transparency in financial reporting and auditing of public companies." Carnero v. Boston Scientific Corp., 433 F.3d 1, 9 (1st Cir.), cert. denied, 126 S. Ct. 2973 (2006). To this end, Congress sought to protect whistleblowers from retaliation, entitling them to civil remedies, such as reinstatement and backpay, because "often, in complex fraud prosecutions, . . . insiders are the only firsthand witnesses to the fraud." S. Rep. No. 107-146, at 10; see also Bechtel v. Competitive Techs., Inc., 448 F.3d 469, 484 (2d Cir. 2006) (Straub, J., dissenting in the result). Because all the civil remedies that Congress established to encourage and protect SOX whistleblowers can be provided through arbitration, the remedial and deterrent purposes of the statute will not be undermined by compulsory arbitration. See Mitsubishi, 473 U.S. at 637; see also Gilmer, 500 U.S. at 32 (arbitration procedures can adequately provide for broad equitable relief).

The argument that arbitration of federal remedial rights would frustrate a plaintiff's function as a private attorney-

general has been consistently rejected by the Supreme Court, which has repeatedly upheld arbitration agreements under various statutes despite objections that arbitration would undermine the public interest. See, e.g., McMahon, 482 U.S. at 222, 241-42 (notwithstanding congressional intent "to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight against organized crime . . . [t]he private attorney general role for the typical RICO plaintiff . . . does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute"); Mitsubishi, 473 U.S. at 635-37 (notwithstanding the antitrust plaintiff's role as "a private attorney-general who protects the public's interest," nothing in the nature of the federal antitrust laws prohibited parties from arbitrating the relevant antitrust claims). Specifically, claims under employment statutes (see, e.g., Gilmer) and the securities laws (see, e.g., McMahon) have been held subject to compulsory arbitration.

While Guyden expresses a general distrust of the arbitral forum (Brief at 14-17), she does not provide any plausible support for her conclusion that whistleblowers will be dissuaded from asserting claims, and that the deterrent features of SOX will be compromised, simply because an employee pursuing a whistleblower claim must pursue her remedies in arbitration.

Notably, this Court has rejected arguments that whistleblower claims are to be treated differently than other statutory claims for purposes of arbitration. See Oldroyd, 134 F.3d at 78-79 (compelling arbitration of a whistleblower claim under the Financial Institutions Reform, Recovery, and Enforcement Act); see also McMahon, 482 U.S. at 239-40 (so long as the plaintiff can obtain compensatory remedies in the arbitral forum, the federal statutes would continue to serve any "incidental policing" and "deterrent" functions) (citing Mitsubishi, 473 U.S. at 635, 637). Accordingly, the district court correctly concluded that arbitration of an employee's whistleblower claim under section 806 does not conflict with Congress's intent in passing SOX.

C. The Confidentiality Provision in Guyden's Arbitration Agreement Does Not Invalidate Her Agreement to Arbitrate Her Employment Dispute Under SOX

The district court also correctly concluded that Guyden's arbitration agreement was valid despite its confidentiality clause, which provides that "[a]ll proceedings, including the arbitration hearing and decision, are private and confidential, unless otherwise required by law" and that "[a]rbitration decisions may not be published or publicized without the consent of both the [Employee] and the Company." J.A. 59.[10] The circuit

[10] Compare AAA Rules, R. 39.b. Arbitration awards "shall be publicly available, on a cost basis. The names of the parties

courts that have considered the issue have overwhelmingly held that a confidentiality provision does not render an arbitration agreement unenforceable. See Iberia, 379 F.3d at 175 (attack on confidentiality provision is "attack on the character of arbitration itself"); Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 280, 281 n.13 (3d Cir. 2004) ("the confidentiality of the proceedings will not impede or burden in any way Parilla's ability to obtain any relief to which she may be entitled" acting in accordance with the court of appeals for the District of Columbia in a similar case) (citing Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997).[11] As the Third Circuit noted, the court in Cole rejected as a "generalized attack[] on arbitration" the argument that the lack of public disclosure of arbitral decisions prevented potential plaintiffs from locating information necessary to build their cases. See Parilla, 368 F.3d at 281 n.13. But cf. Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (confidentiality requirement contained in AT&T's customer services arbitration agreement was unconscionable under California law because it affected millions of Californians and prevented potential

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and witnesses will not be available, unless a party expressly agrees to have its name made public in the award."

[11] To our knowledge, this Court has not yet opined on the confidentiality issue.

plaintiffs from obtaining the necessary information with which to present their claims).

Guyden fails to demonstrate how the confidentiality provision prevents her from vindicating her individual rights under SOX. See Parilla, 368 F.3d at 280. Here, as in Parilla, under the arbitration agreement's confidentiality provision, "[e]ach side has the same rights and restraints . . . and there is nothing inherent in confidentiality itself that favors or burdens one party vis-à-vis the other in the dispute resolution process." Id.

Nor has Guyden demonstrated how preserving the confidentiality of arbitration proceedings is any different from the confidential settlement of SOX whistleblower cases in district court, which also are not statutorily prohibited. See Gilmer, 500 U.S. at 32 (noting that concerns about public knowledge of ADEA arbitrations "apply equally to settlements of ADEA claims, which . . . are clearly allowed"); Iberia, 379 F.3d at 176 (upholding confidentiality provision where nothing in underlying law prohibits confidential settlement of the claims at issue); Parilla, 368 F.3d at 281 (same). Accordingly, the confidentiality clause in Guyden's arbitration agreement does not invalidate the arbitration of her SOX complaint.[12]

[12] The district court noted that two other statutory provisions providing additional protections to whistleblowers help to

D. The Discovery Restrictions in Guyden's Arbitration Agreement Do Not Render Arbitration Inappropriate

The district court correctly concluded that complaints under section 806 of SOX can be effectively litigated even if discovery is limited and arbitrators do not have subpoena authority to compel discovery. Courts have repeatedly held that discovery restrictions are not a bar to arbitration. See Gilmer, 500 U.S. at 31 (discovery in arbitration, though less extensive than that available in district court, was sufficient to allow plaintiff fair opportunity to present ADEA claims); McMahon, 482 U.S. at 232 ("the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights"); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 673 & n.16 (6th Cir. 2003) (plaintiff failed to show how arbitration's discovery restrictions prevented her from presenting employment discrimination claims); Sobol v. Kidder, Peabody & Co., 49 F. Supp. 2d 208, 223 (S.D.N.Y. 1999) (same).

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ensure that SOX's goal of corporate openness is not frustrated by a confidentiality provision in an agreement to arbitrate a section 806 complaint. J.A. 113. Specifically, retaliation against individuals providing truthful information to law enforcement officers concerning the commission of any federal offense is subject to criminal sanctions. See 18 U.S.C. 1513(e). Also, audit committees are directed to establish procedures for "receipt, retention, and treatment of complaints" concerning accounting and auditing matters, and "confidential, anonymous submission by employees . . . of concerns regarding questionable accounting or auditing matters." 15 U.S.C. 78j-1(m)(4).

Although a minimal amount of discovery presumably is necessary for a plaintiff effectively to exercise her statutory rights, see Martin v. SCI Mgmt. L.P., 296 F. Supp. 2d 462, 468 (S.D.N.Y. 2003), the district court correctly concluded that the discovery provisions in this agreement are sufficient. Importantly, the arbitration agreement allows the arbitrator to order additional discovery beyond the terms of the agreement "upon a showing that it is necessary for that party to have a fair opportunity to present a claim or defense." J.A. 59.[13] As the district court stated, "absent provisions affording Aetna a favorable bias, the Court cannot indulge in the presumption that the arbitrator will act without equanimity to deny plaintiff's request." J.A. 120 (citing Gilmer, 500 U.S. at 30).

It is noteworthy that Congress entrusted the administration and enforcement of section 806 claims in the first instance to the Secretary, see 18 U.S.C. 1514A(b)(2)(A), and intended that those complaints be handled expeditiously. Specifically, investigations are to be conducted within 60 days and final decisions are to be issued within 120 days after the end of the ALJ hearing. See 49 U.S.C. 42121(b)(2), (b)(3). To accommodate

[13] Compare AAA Rules, R. 9, providing generally that "the arbitrator shall have the authority to order discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."

Congress's intent that SOX complaints be adjudicated in a fair and expeditious manner, the Department's implementing regulations provide ALJs with broad discretion to limit discovery. See 29 C.F.R. 1980.107(b) (the ALJ has "broad discretion to limit discovery in order to expedite the hearing").

Additionally, as the district court recognized, an arbitrator's lack of subpoena authority to compel discovery should not render discovery provisions deficient. While the circuit courts are split concerning whether an arbitrator has authority to subpoena third-parties for pre-hearing discovery, no court has concluded that the absence of pre-hearing subpoena power invalidates an arbitration agreement.[14] In any event, To

[14] Compare Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 408 (3d Cir. 2004) (the FAA does not authorize arbitrators to subpoena for discovery those who are not parties to the arbitration), and Comsat Corp. v. National Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999) (arbitrators cannot subpoena discovery of third-parties absent a showing of "special need" by the party seeking discovery), with In re Security Life Ins. Co. of Am., 228 F.3d 865, 870 (8th Cir. 2000) (subpoena power to order document production in discovery is implicit in an arbitrator's power to subpoena the documents at a hearing), and American Fed'n of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1009 & n.7 (6th Cir. 1999) (arbitrators have authority to subpoena third-parties to produce documents in discovery). To our knowledge, this Court has yet to decide whether arbitrators may subpoena third-parties to produce documents or attend depositions for discovery purposes. See National Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 188 (2d Cir. 1999) ("open questions remain as to whether [the FAA] may be invoked as authority for compelling pre-hearing depositions and pre-hearing

Whom It May Concern: the extent that Guyden can convince the arbitrator that certain documents or witnesses are necessary for her to present her case, section 7 of the FAA authorizes the arbitrator to compel production of those documents or the appearance of witnesses at a preliminary hearing. See Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 578-79 (2d Cir. 2005).

Significantly, section 806 of SOX does not provide the Department of Labor with subpoena authority and yet, as noted above, Congress entrusted the administration and enforcement of SOX whistleblower claims to the agency.[15] Thus, Congress clearly

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document discovery, especially where such evidence is sought from non-parties").

[15] An ALJ does not have the authority to issue subpoenas absent Congress' clear grant of such authority. See 5 U.S.C. 556(c)(2) (agencies may "issue subpoenas authorized by law"); EEOC v. Maryland Cup Corp., 785 F.2d 471, 475 (4th Cir. 1986) ("Upon petitioning for enforcement of an administrative subpoena, the issuing agency must make a threshold showing that the subpoena is within the agency's authority . . . ."); Johnson v. United States, 628 F.2d 187, 193 (D.C. Cir. 1980) ("Subpoena power is not an intrinsic feature of the administrative process, and courts cannot engraft subpoena authority onto an agency's charter from Congress."); United States v. Security State Bank & Trust, 473 F.2d 638, 642 (5th Cir. 1973) ("The Secretary [of Agriculture] has no subpoena power other than that conferred by statute . . . ."); see also Attorney General's Manual on the Administrative Procedure Act 67 (1947) (explaining that section 556(c)(2) relates only "to existing subpoena powers conferred upon agencies; it does not grant power to issue subpoenas to agencies which are not so empowered by other statutes"). Consistent with this authority, courts have held that ALJs do not have subpoena authority under other whistleblower statutes administered and enforced by the Department that do not expressly confer such authority. See, e.g., Bobreski v. United States EPA, 284 F. Supp. 2d 67, 75-78 (D.D.C. 2003) (Congress

anticipated that an employee could obtain a fair adjudication of his or her SOX whistleblower claim, even if he or she lacks an ability to subpoena documents or testimony for pre-hearing discovery.

A SOX retaliatory discharge claim is no more complex nor likely to require more evidence than other statutory claims that have been held subject to arbitration. See Gilmer, 500 U.S. at 31 ("It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims."). Moreover, it is undisputed that third-party testimony and document production can be compelled by an arbitrator at a hearing on the merits or during an evidentiary hearing before the final hearing on the merits, if Guyden demonstrates such a need. 9 U.S.C. 7. The district court thus properly concluded that Guyden's complaint can be effectively litigated notwithstanding its discovery restrictions.

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did not grant Department of Labor subpoena power under six environmental whistleblower statutes). However, in Childers v. Carolina Power & Light Co., 2000 WL 1920346 (Admin. Review Bd. 2000), the Department's ARB stated, in dicta, that ALJs have inherent authority to issue subpoenas even in the absence of express statutory authorization, which has led some ALJs to issue subpoenas in whistleblower cases.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)(2)
FOR CASE NUMBER 06-4954

Type-Volume Limitations

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c) and the Second Circuit Rule 32(a)(2), the attached amicus brief was prepared using Microsoft Office Word 2003 and the monospaced typeface Courier New 12 points or more and contains 7,000 words or less.

Dated: February 21, 2007

/s/
ROGER W. WILKINSON
Attorney

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32(a)
FOR CASE NUMBER 06-4954

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Dated: February 21, 2007

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2007, a PDF version was emailed and two paper copies of the foregoing Brief for the Secretary of Labor as amicus curiae were served using first-class mail, postage prepaid, upon the following counsel of record:

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