No. S162570
(Ninth Circuit Court of Appeals No. 06-15847)
(U.S. District Court No. CV-05-03633-MJJ)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEVIN MURRAY,
Plaintiff, Appellant and Respondent,

v.

ALASKA AIRLINES, INC.,
Defendant, Appellee and Petitioner.

On Certification From The United States Court Of Appeals For The Ninth Circuit

ALASKA AIRLINES' OPENING BRIEF ON THE MERITS

DAVID J. REIS (No. 155782)
Email: dreis@howardrice.com
JASON M. HABERMEYER (No. 226607)
Email: jhabermeyer@howardrice.com
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600
Facsimile: 415/217-5910

Attorneys for Defendant, Appellee and Petitioner Alaska Airlines, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

ISSUE CERTIFIED TO THIS COURT

Should issue-preclusive effect be given to a federal agency's investigative findings, when the subsequent administrative process provides the complainant the option of a formal adjudicatory hearing to determine the contested issues *de novo*, as well as subsequent judicial review of that determination, but the complainant elects not to invoke his right to that additional process?

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue this case presents is whether findings contained in a federal administrative decision are entitled to collateral estoppel effect when that decision is subject to both administrative and judicial review but the plaintiff elects not to pursue these remedies. Under the three-part test this Court established in *People v. Sims*, 32 Cal. 3d 468 (1982), for applying collateral estoppel to administrative agency decisions, well-established principles of comity and federalism, and the doctrine requiring exhaustion of judicial remedies, the answer is a resounding "yes."

Plaintiff Kevin Murray ("Plaintiff") is a former employee of Defendant Alaska Airlines ("Alaska Airlines" or "Defendant") who claims that the airline terminated his employment because he had disclosed information regarding unsafe conditions and industrial safety violations to Federal Aviation Administration ("FAA") officials. Plaintiff—who has been represented by counsel at every step—filed a complaint with the United States Department of Labor under the so-called AIR21 statute, 49 U.S.C. §42121, the comprehensive federal scheme to adjudicate whistle-blowing claims of employees providing air safety information. On the basis of documentary evidence and witness testimony supplied by both parties, the Secretary of Labor found that Alaska Airlines had not retaliated against Plaintiff for alleged whistle-blowing activities because there was no causal connection between the alleged whistle-blowing and Plaintiff's termination.

Plaintiff failed to request a review of the Secretary's decision by an Administrative Law Judge, which would have given him a trial-like hearing to contest the Secretary's decision, as well as the opportunity for further review of the final administrative decision by the United States Court of Appeals for the Ninth Circuit. Under the plain language of the relevant federal statute, the Secretary's decision thereby became "a final order that is not subject to judicial review." 49 U.S.C. §42121(b)(2)(A).

Instead of pursuing the administrative and judicial remedies provided by federal law, Plaintiff brought this identical action in the hope that a "second opinion" would result in a more favorable outcome. After Defendant removed the case to federal court, the United States District Court for the Northern District of California granted summary judgment for Alaska Airlines on the grounds that Plaintiff is collaterally estopped from relitigating issues that were already decided by the Secretary and that are essential to his "new" claims.

Plaintiff then appealed to the United States Court of Appeals for the Ninth Circuit. Noting the lack of "squarely controlling California cases addressing" whether Plaintiff had an "opportunity to litigate" (*Murray v. Alaska Airlines, Inc.*, 522 F.3d 920, 923 (9th Cir. 2008) ("Order Requesting Certification")) under the facts of this case, the Ninth Circuit requested this Court to decide the issue-preclusive effect of the Secretary's decision under California law.

This Court should hold that that decision is entitled to collateral estoppel effect. The administrative proceedings that Plaintiff initiated before the Secretary of Labor are quasi-judicial and resolved disputed factual issues that Plaintiff himself tendered to the Secretary for decision. Plaintiff's failure to obtain review of the Secretary's decision by a federal Administrative Law Judge forecloses any argument that he did not have an adequate opportunity to litigate his claims before the Department of Labor. *See* Part I(A), *infra*. Moreover, the traditional criteria for establishing collateral estoppel are met here. The causation issue resolved by the Secretary of Labor is the same issue raised by Plaintiff's complaint

in this action and the parties to the two proceedings are identical. *See* Part I(B), *infra*. Finally, important public policies support application of collateral estoppel to the facts of this case. First, applying collateral estoppel will further the strong federal policy of giving finality to unreviewed administrative determinations of the Secretary under the AIR21 statute. Applying collateral estoppel also serves the state law policies of promoting judicial integrity and economy and protecting parties against repetitive litigation. *See* Part I(C), *infra*. Finally, since Plaintiff failed to initiate judicial (as well as administrative) review of the Secretary's decision, applying collateral estoppel here is compelled by the California doctrine requiring exhaustion of judicial remedies. *See* Part II, *infra*.

STATEMENT OF FACTS[1]

A. Plaintiff Is Terminated By Alaska Airlines.

Alaska Airlines hired Plaintiff in June 2002 as an Aircraft Maintenance Technician in its Oakland, California heavy maintenance base. 9th Circuit Excerpts of Record ("ER") 3 ¶9; ER 58. In June 2003, Plaintiff became a Quality Assurance Auditor at the Oakland facility. ER 123 ¶1. In this position, Plaintiff was primarily responsible for the development and implementation of Alaska Airlines' Quality Assurance auditing program. ER 50 ¶2.

In or about September 2004, Alaska Airlines closed its Oakland heavy maintenance base to improve its long-term viability in a competitive market. ER 50 ¶3; *see also* ER 123 ¶2. All employees, including Plaintiff, received notice of the Oakland base closure on September 9, 2004. ER 123 ¶3. With the closure of the Oakland maintenance base, Plaintiff's Quality Assurance Auditor position was eliminated. ER 123 ¶4. Plaintiff was not hired for another

[1]Almost all material facts in this case are undisputed, many of which are set forth in a Joint Statement of Undisputed Facts, submitted in support of Alaska Airlines' Motion for Summary Judgment. *See* ER 122-24.

position within Alaska Airlines following the base closure; as a result, Plaintiff's employment was terminated. ER 123 ¶¶5-6.

B. Plaintiff Initiates—And Loses—AIR21 Administrative Proceedings Against Alaska Airlines.

On December 8, 2004, Plaintiff (who was already represented by counsel) filed a complaint with the Secretary of Labor against Alaska Airlines alleging that his termination and failure to be hired for another position violated Section 519 of the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century ("AIR21"), codified in 49 U.S.C. §42121. ER 58-60, 123 ¶7. Since these proceedings are at the heart of this case, we shall describe in some detail the governing statute and the administrative and judicial remedies that Plaintiff first invoked and then waived.

1. The AIR21 Statute Gives Alleged Whistle-Blowers A Panoply Of Administrative And Judicial Rights To Pursue Their Claims While Providing That Unreviewed Administrative Determinations Are Final And Not Subject To Judicial Review.

The AIR21 statute contains the Whistleblower Protection Program ("WPP"), the comprehensive federal administrative program for adjudicating whistle-blowing claims of airline employees who raise air carrier safety concerns.

Under the WPP, an employee who believes that he was retaliated against for providing air carrier safety information to his employer and/or the federal government may—but is not required to—file a complaint with the Secretary of Labor. 49 U.S.C. §42121(b)(1). The Secretary must give the defendant named in the complaint the opportunity to submit a written response to the complaint and witness statements. *Id.* §42121(b)(2)(A). The Secretary then conducts an investigation and issues a written preliminary order of her findings, either that the complaint is without merit or that there is "reasonable cause" to believe that a violation has occurred. *Id.* If the Secretary determines that the complaint has merit, the Secretary *must*

order the employer to (1) take affirmative action to abate the violation, (2) reinstate the employee to his former position and award compensation, including back pay, and (3) provide compensatory damages. *Id.* §42121(b)(3)(B).

No later than thirty days after the issuance of the Secretary's preliminary order, either side may file objections to the findings and/or preliminary order, and request a hearing before an Administrative Law Judge ("ALJ") on the record. *Id.* §42121(b)(2)(A). *Failure to timely request a hearing before an ALJ results in a final order that is not subject to judicial review. Id.*; *see also* 29 C.F.R. §1979.106(b)(2) (2007).

If a hearing is requested, the ALJ must, *inter alia*, take documentary and witness evidence, maintain a record of the proceedings and issue a final order based on the evidence presented. *See* 29 C.F.R. §1979.107(a) (2007) (providing that AIR21 hearings are to be conducted in accordance with the rules of practice and procedure codified at 29 C.F.R. pt. 18(A) (2007)). Either party seeking to appeal the ALJ's decision must file a petition for review with the Administrative Review Board, and a party aggrieved by the Board's decision may appeal to the local United States Court of Appeals no later than sixty days after the Board's decision is issued. 29 C.F.R. §1979.110(a) (2007); *id.* §1979.112(a) (2007); 49 U.S.C. §42121(b)(4)(A). Failure to timely file a petition of review before the appropriate circuit court results in a final order "that is not subject to judicial review in any criminal or other civil proceeding." 49 U.S.C. §42121(b)(4)(B); 29 C.F.R. §1979.112(a) (2007).

2. Plaintiff Asks The Department Of Labor To Decide Whether He Was Terminated In Retaliation For Alleged Whistle-Blowing Activity.

Plaintiff's complaint to the Secretary of Labor ("AIR21 Complaint") alleged that between July 2003 and September 2004, Plaintiff disclosed information regarding unsafe conditions and industrial safety violations at Alaska Airlines' Oakland facility to FAA

inspectors. ER 59. Plaintiff alleged that he "was admonished and chastised" upon informing Alaska Airlines management of these disclosures. *Id.* Finally, he claimed that in retaliation for notifying the FAA of these violations and unsafe conditions, Alaska Airlines terminated Plaintiff and refused to rehire him as a Quality Assurance Auditor at another location:

> I was terminated in retaliation for my notifying FAA Aviation Safety Inspectors of Federal Aviation Regulations (FAR's and CFR's) violations and for serious airworthiness issues posing a threat to air safety occurring within the Alaska Airline [sic] Maintenance and Engineering Department, including potentially catastrophic aircraft maintenance hazards and potentially fatal industrial safety hazards within the work place. (ER 58)

Plaintiff also alleged that while "[m]any other Oakland management personnel remained in their departments and transitioned to similar positions in Seattle, without applying or interviewing for open positions . . . , I was refused an open QA auditor position in Seattle despite my stated and documented request to remain with Alaska Airlines." *Id.*

3. The Department Of Labor Rejects Plaintiff's Claim That He Was Terminated Due To Whistle-Blowing Activity, Finding No Causal Nexus Between The Activity And The Termination.

On June 8, 2005, following an investigation and the receipt of documentary evidence and witness statements from both parties, the Secretary of Labor found "no credible basis to believe" that Alaska Airlines retaliated against Plaintiff for whistle-blowing in violation of the AIR21 statute, and dismissed Plaintiff's AIR21 Complaint. ER 62. The Secretary found that Plaintiff failed to establish a causal connection between his termination and his disclosures of safety information to the FAA. ER 63-64. Specifically, the Secretary found that Plaintiff was not considered for two open auditor positions in Seattle because he removed himself from consideration by removing his résumé from Alaska Airlines' employment website the same night he posted it. ER 63. Thus, the Secretary concluded that

"the evidence shows that [Alaska Airlines] acted reasonably when [Plaintiff] was laid off from his job" and that Plaintiff "failed to establish a nexus between his protected activity and the perceived discriminatory action taken against him." ER 64.

The Secretary's decision specifically informed Plaintiff of his "important rights of objection which must be exercised in a timely fashion" and the consequences of not doing so:

> AIR21 permits an aggrieved party, **WITHIN 30 DAYS** of receipt of the Secretary's Findings, to file objections with the Department of Labor and to request a hearing on the record before an Administrative Law Judge. If you file objections, you will have the responsibility of litigating your position before an Administrative Law Judge of the Department of Labor. *If no objections are filed **WITHIN 30 DAYS**, this decision shall become final and not subject to judicial review.* (ER 64 (bold emphasis in original; italicized emphasis added))

Plaintiff admittedly never filed objections or requested a hearing before an ALJ. *See* ER 123-24. Nor did he take any steps to formally withdraw his administrative complaint. *See* 29 C.F.R. §1979.111(a) (2007) (allowing complainant to withdraw his complaint by filing a written withdrawal with the Assistant Secretary of Labor, who "then determine[s] whether the withdrawal will be approved"). Thus, as of July 8, 2005, the Secretary's decision was "deemed a final order . . . not subject to judicial review." 49 U.S.C. §42121(b)(2)(A); *see also* Order Requesting Certification, 522 F.3d at 922.

C. Plaintiff Elects Not To Seek Administrative And Judicial Review Of The DOL's Adverse Decision, Instead Filing An Action In Superior Court That Raises The Same Issues.

Rather than pursue the administrative and judicial remedies given him by the AIR21 statute, Plaintiff elected to file the present action in Alameda County Superior Court on August 2, 2005. ER 1-15. Plaintiff's "new" Complaint (the "Civil Complaint") alleged two causes of action: (1) Wrongful Termination and (2) Violation of Public Policy: Retaliation for Whistle Blowing. *Id.* Alaska Airlines

removed the action to the United States District Court for the Northern District of California based on diversity jurisdiction.

Plaintiff's Civil Complaint is virtually identical to his AIR21 Complaint, and in fact, incorporates verbatim some of the same language in the allegations forming the prior complaint. *See, e.g.*, ER 6 ¶17; 9 ¶27 (alleging disclosures regarding unsafe conditions and industrial safety violations at the Oakland facility to FAA Aviation Inspectors); ER 7 ¶18; 9 ¶28 (alleging that Plaintiff "was admonished and chastised" upon informing Alaska Airlines management of the disclosures); *compare* ER 6 ¶17; 9 ¶27 *with* ER 59 (using verbatim language to describe industrial safety violations). In particular, the Civil Complaint renewed (in both claims) Plaintiff's already-rejected allegations that he was terminated in retaliation for notifying FAA inspectors of these violations and unsafe conditions and that he was refused an open Quality Assurance Auditor position in Seattle. ER 7 ¶¶19-20; 9-10 ¶¶29-30.

D. The District Court Finds That Plaintiff's Claims Are Barred By Collateral Estoppel And The Ninth Circuit Certifies The Issue To This Court.

On March 27, 2006, Judge Martin J. Jenkins of the U.S. District Court granted Alaska Airlines' Motion for Summary Judgment on both causes of action in Plaintiff's Civil Complaint. ER 125-35. Judge Jenkins held that Plaintiff was precluded from contesting the Secretary of Labor's factual findings under the doctrine of collateral estoppel. ER 131-35. Specifically, the court concluded that the Secretary's finding that there was no causal nexus between Plaintiff's termination and his whistle-blowing activity estopped Plaintiff from relitigating the causation issue that was essential to establishing Plaintiff's state law claims. *Id.* In so holding, the court found that the WPP procedures were sufficiently adjudicatory for collateral estoppel purposes, and that Plaintiff could not complain about the opportunity to fully litigate his claim, having abandoned the administrative procedures. ER 132-33.

Plaintiff appealed to the United States Court of Appeals for the Ninth Circuit. ER 137-39. On April 10, 2008, the Ninth Circuit issued an order requesting this Court to decide the certified question set forth above (*see* p.1, *supra*). The Ninth Circuit predicated its request on the basis that

> [t]here do not appear to be squarely controlling California cases addressing whether an "opportunity to litigate" requires that an actual hearing with adequate procedural safeguards take place, or if instead it is enough that the agency's procedures afford the complainant the right to seek an adjudicatory hearing after the findings are made. (Order Requesting Certification, 522 F.3d at 923)

This Court granted certification on June 18, 2008.

ARGUMENT

I.

THE SECRETARY OF LABOR'S RULING THAT PLAINTIFF WAS NOT TERMINATED DUE TO ALLEGED WHISTLE-BLOWING IS ENTITLED TO PRECLUSIVE EFFECT UNDER CALIFORNIA LAW.

The Secretary of Labor's unchallenged decision found no causal nexus between Plaintiff's whistle-blowing activity and his termination. ER 62-64. It is undisputed that causation is a required element of both claims in Plaintiff's Civil Complaint.[2] Thus, so long as the requirements for applying collateral estoppel under California law are met here, the Secretary's decision has a preclusive effect on and is fatal to Plaintiff's claims. *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 827-29 (1999) (collateral estoppel precludes a party from relitigating issues previously decided in another proceeding).

---

[2]*See Morgan v. Regents of the Univ. of Cal.*, 88 Cal. App. 4th 52, 69-70 (2000) (to establish a prima facie case of retaliation, plaintiff must show a "causal link" between the protected activity and the adverse employment action); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 1258 (1994) (causal nexus between adverse employment action and whistle-blowing activity is essential in establishing claim for wrongful termination in violation of public policy).

This Court held over twenty-five years ago that administrative agency decisions are to be given preclusive effect on later-filed court actions if they satisfy a three-part test. First, the agency must be "acting in a judicial capacity and resolve[] disputed issues of fact properly before it which the parties have had an *adequate opportunity to litigate*." *People v. Sims*, 32 Cal. 3d 468, 479 (1982) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)) (emphasis added by *Sims* Court). Second, the traditional criteria for applying collateral estoppel must be satisfied. 32 Cal. 3d at 484 & n.14; *see also People v. Garcia*, 39 Cal. 4th 1070, 1077 (2006). Finally, courts are to examine whether public policies would be furthered by application of the collateral estoppel doctrine. *Sims*, 32 Cal. 3d at 488-89. All three prongs of this test are satisfied in this case.

A. The Labor Department's Administrative Procedures Gave Plaintiff A Full And Fair Opportunity To Litigate A Disputed Issue Of Fact—The Cause Of His Termination—Before An Administrative Agency That Was Authorized By Statute To Act In A Judicial Capacity.

As just noted, the first prong of the *Sims* test for applying collateral estoppel to administrative decisions turns on whether the administrative agency "is *acting in a judicial capacity* and *resolves disputed issues of fact* properly before it which the parties have had *an adequate opportunity to litigate*." *Sims*, 32 Cal. 3d at 479 (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. at 422) (emphases added by *Sims* Court). The DOL proceedings at issue here meet each of these criteria.

1. The Department Of Labor's Procedures Are Judicial In Character.

In determining whether an agency acted in a judicial capacity, courts look for the presence of factors indicating that the administrative proceedings and determination possessed a "judicial character." *Sims*, 32 Cal. 3d at 479. Here, the Secretary's decision to dismiss

Plaintiff's complaint for lack of a causal nexus between Plaintiff's whistle-blowing and his termination was "adjudicatory in nature." *Id.* at 480. The decision applied the rule of law, as contained in the AIR21 statute, "to a specific set of existing facts, rather than the formulation of a rule to be applied to all future cases." *Id.* (citation and internal quotation marks omitted); *see also Briggs v. City of Rolling Hills Estates*, 40 Cal. App. 4th 637, 648 (1995) (agency's application of "general standard in the ordinance to plaintiff's specific project and property" constituted an adjudicatory, not legislative, function) (citations omitted). Moreover, the decision was in writing, with a statement of reasons, and was subject to later judicial review; these factors also indicate that the administrative proceeding and determination possessed a "judicial character." *See Sims*, 32 Cal. 3d at 480; *Vandenberg*, 21 Cal. 4th at 829 (in determining the judicial nature of the prior forum, courts are "particularly" to consider "the opportunity for judicial review of adverse rulings") (citations omitted). The Secretary's determination was thus judicial.

2. The Secretary Properly Resolved Disputed Issues Of Fact That Plaintiff Presented To The Department For Determination.

Plaintiff has never denied that the Secretary resolved issues of fact that were properly raised by his complaint. *Cf.* Appellant's 9th Circuit Opening Brief ("AOB") 5 (discussing Department's "relevant findings" to Plaintiff's AIR21 Complaint). Indeed, the AIR21 statute requires the Secretary to investigate complaints that an air carrier has discriminated against an airline employee who has blown the whistle on an air carrier safety violation and to make the findings necessary to determine whether there is reasonable cause to believe that the complaint has merit. 49 U.S.C. §42121(b)(2)(A).

Here, the Secretary did just what the statute requires. She found that although Plaintiff participated in protected whistle-blowing activity and experienced adverse employment actions, there was no causal nexus between the two. Having tendered these issues to the Secretary for determination (presumably on the advice of counsel),

Plaintiff cannot contend that the Secretary "did not resolve disputed issues of fact properly before [her]." *Sims*, 32 Cal. 3d at 481.

3. Plaintiff Had Several Opportunities To Litigate The Factual Issues Resolved By The Department Of Labor.

As this Court has recognized, in determining whether there was an opportunity to litigate for purposes of applying collateral estoppel, "the important question . . . is whether the [plaintiff] had the opportunity" to litigate, "*not whether [he] availed himself of the opportunity*." *Lucido v. Superior Court*, 51 Cal. 3d 335, 340 n.2 (1990) (emphasis added); *see also Rymer v. Hagler*, 211 Cal. App. 3d 1171, 1178-79 (1989) ("[i]t is the opportunity to litigate that is important . . . , *not whether the litigant availed him or herself of the opportunity*") (emphasis added); *Castillo v. City of Los Angeles*, 92 Cal. App. 4th 477, 482 (2001) (what is relevant is that plaintiff "was entitled to a full hearing and [would have] had ample opportunity to raise issues and present evidence at that hearing"). Indeed, in *Sims* itself, the County had the right to present evidence at the administrative hearing but failed to do so; this Court held that this failure did not deprive the administrative decision of collateral estoppel effect. *See Sims*, 32 Cal. 3d at 481-82 ("[w]hat is significant here is that the County had . . . the opportunity and incentive to present its case to the hearing officer. . . . The People cannot now take advantage of the fact that the County avoided its litigation responsibilities and chose not to present evidence at the prior proceeding").

These principles are controlling here. After the Secretary's decision, Plaintiff had the right to file objections with the Department of Labor, request an on-the-record hearing before an ALJ and appeal to the local United States Court of Appeals. 49 U.S.C. §42121(b)(2)(A) & (b)(4)(A). Had Plaintiff availed himself of this opportunity, he would have received a formal administrative hearing with the right to subpoena witnesses, present documentary evidence and obtain a verbatim record of the proceedings, among other procedures. *See* 29 C.F.R. §18.24 (2007) (subpoenas); *id.* §18.47 (exhibits); *id.* §18.52

(record of hearings); *id.* §18.59 (certification of official record); *see generally id.* §1979.107(a) (providing that WPP hearings under AIR21 statute will generally be conducted in accordance with rules of practice and procedure codified at 29 C.F.R. pt. 18(A)). These procedural safeguards are fatal to any claim that Plaintiff did not have an adequate opportunity to adjudicate his case before the Department of Labor.

Courts analyzing claims under the Department's federal whistle-blower statutes[3] afford collateral estoppel effect to the Department's administrative findings when the party failed to take advantage of additional procedures that were available to him. In *Fadaie v. Alaska Airlines, Inc.*, 293 F. Supp. 2d 1210, 1218 (W.D. Wash. 2003), a case strikingly similar to this one, the District Court considered whether plaintiff's retaliation claim under state law was barred by *res judicata* where a significant portion of the claim rested on allegations already presented in an AIR21 complaint to the Department of Labor. Plaintiff argued that *res judicata* was inappropriate because the Secretary of Labor's decision was based on an investigation rather than an adjudicative proceeding and thus he was denied a full and fair opportunity to present his claims. 293 F. Supp. 2d at 1219. The court rejected this argument, finding that the WPP procedures afforded plaintiff "ample opportunity to fully present his claims, including avenues of appeal that provided direct and apparently unique access to the federal appellate courts." *Id.* at 1219 n.3. The court also found that plaintiff was estopped from asserting he was denied the opportunity to litigate because he had

---

[3]There are at least a dozen virtually identical or substantially similar federal administrative statutes like the AIR21 statute for adjudicating whistle-blower claims. *See* 18 U.S.C. §1514A (Sarbanes-Oxley Act); 49 U.S.C. §31105 (Surface Transportation Assistance Act); 49 U.S.C. §60129 (Pipeline Safety Improvement Act); 42 U.S.C. §5851 (Energy Reorganization Act); 42 U.S.C. §7622 (Clean Air Act); 42 U.S.C. §300j-9 (Safe Drinking Water Act); 33 U.S.C. §1367 (Clean Water Act); 15 U.S.C. §2622 (Toxic Substances Control Act); 42 U.S.C. §6971 (Solid Waste Disposal Act); 42 U.S.C. §9610 (CERCLA); 5 U.S.C. §2302 (Whistleblower Protection Act).

opted not to request a hearing before an ALJ after receiving the Secretary's adverse decision:

> For whatever reason, Mr. Fadaie opted not to request a hearing before an Administrative Law Judge. After receiving the Regional Administrator's decision letter, he decided not to follow through on the procedures set forth in the letter, thereby waiving his right to an adversarial hearing. Contrary to plaintiff's argument, the WPP provides complainants with an opportunity to fully and fairly litigate their claims: plaintiffs cannot now argue that the procedures utilized by the agency were insufficient when it was Mr. Fadaie's choice to forego the admittedly sufficient procedures to which he was entitled. (*Id.* at 1219-20)[4]

Similarly, in *Gundersen v. Manion*, No. 311386, 1996 WL 456378, at **2-3 (Conn. Super. Ct. July 23, 1996), plaintiff was collaterally estopped from relitigating whether he was retaliated against for whistle-blowing activity in violation of the Energy Reorganization Act of 1974 where plaintiff failed to timely challenge the Department of Labor's investigatory findings. The court specifically rejected plaintiff's argument that, because "'there was no presentation of evidence, opportunity to rebut evidence presented by the employer, no cross examination of witnesses and no impartial fact[-]finder,'" collateral estoppel did not apply. *Id.* at *3. Plaintiff

---

[4]Although the *Fadaie* court considered whether the application of *res judicata*, not collateral estoppel, was appropriate, the court's analysis is applicable here. First, collateral estoppel is an aspect of *res judicata*. *Sims*, 32 Cal. 3d at 477 n.6. Second, the *Fadaie* court applied Washington law, under which

> [a]n adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including . . . [t]he right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties . . . . (293 F. Supp. 2d at 1219 (citation omitted))

California law also requires that an administrative proceeding be sufficiently adjudicatory—meaning it must provide the parties an opportunity to present evidence and fully litigate the issues—in order to be given preclusive effect. *See Rymer*, 211 Cal. App. 3d at 1178-79.

had the right to such a hearing before an ALJ but failed to request one after being advised of his right to do so. *Id.* "[T]he touchstone of this question is [plaintiff's] *opportunity* to fully litigate his claim below, not whether he exercised that option. [Plaintiff], having failed to exercise his right to a full hearing before an administrative law judge . . . , is now precluded from relitigating those issues before this court." *Id.* (emphasis in original).[5]

The cases applying collateral estoppel to administrative findings where a party has failed to utilize available administrative remedies are also consistent with the California cases applying collateral estoppel in judicial proceedings. Thus, California courts afford issue-preclusive effect to default judgments. *Estate of Williams*, 36 Cal. 2d 289, 293 (1950) ("[a] default judgment is an estoppel to all issues necessarily litigated therein and determined thereby exactly like any other judgment . . .") (citation and internal quotation marks omitted); *Gottlieb v. Kest*, 141 Cal. App. 4th 110, 149 (2006) ("California . . . accords collateral estoppel effect to default

---

[5]Numerous federal circuit court decisions similarly give collateral estoppel effect to administrative agency decisions similar to the DOL determination at issue here where the plaintiff fails to invoke available procedural remedies. *See Taylor v. Heckler*, 765 F.2d 872, 875-76 (9th Cir. 1985) (plaintiff's failure to seek hearing before ALJ after Secretary of Health and Human Services denied her claim for benefits resulted in *res judicata* on subsequent review where plaintiff failed to seek timely reconsideration of initial determination); *Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir. 1988) ("[i]f an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administrative decision simply by foregoing [the] right to appeal") (citation omitted); *Misischia v. Pirie*, 60 F.3d 626, 630 (9th Cir. 1995) (same); *Gibson v. U.S. Postal Serv.*, 380 F.3d 886, 888-89 (5th Cir. 2004) (affirming application of *res judicata* effect of agency's "paper hearing" where plaintiff failed to timely appeal decision); *Tobak v. Apfel*, 195 F.3d 183, 188 (3d Cir. 1999) (affirming application of *res judicata* to denial of plaintiff's social security benefits application despite lack of evidentiary hearing; "[Plaintiff's] prior application became final when he failed to pursue his administrative appeals from the denial of his application. Although [plaintiff] did not have a hearing, that was because he waived his opportunity to request a hearing at that stage").

judgments, at least where the judgment contains an express finding on the allegations"); *see also Fitzgerald v. Herzer*, 78 Cal. App. 2d 127, 131-32 (1947) ("A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint") (citations omitted).

Plaintiff voluntarily initiated the AIR21 proceeding but failed to take advantage of the administrative review that statute offered to review the Secretary's decision. Plaintiff cannot now avoid the preclusive effect of the Secretary's decision, or contend that the decision is somehow unfair, based on his own procedural default.

B. The Traditional Criteria For Applying Collateral Estoppel To The Secretary's Decision Are Satisfied.

This Court held in *Sims* that even if an administrative agency's decision was made in a sufficiently adjudicatory forum, a court must also look to whether the traditional criteria for the application of collateral estoppel are satisfied. 32 Cal. 3d at 484 & n.14. Under California law, collateral estoppel applies to bar relitigation of an issue decided at a former proceeding if (1) "the issue sought to be precluded from relitigation [is] identical to that decided in [the] former proceeding"; (2) the issue was "actually litigated in the former proceeding"; (3) the issue was "necessarily decided in the former proceeding"; (4) "the decision in the former proceeding [was] final and on the merits"; and (5) "the party against whom preclusion is sought [is] the same as, or in privity with, the party to the former proceeding." *Lucido*, 51 Cal. 3d at 341.

With the arguable exception of the "actually litigated" requirement, Plaintiff did not challenge any of these criteria on appeal. He did not dispute that the identical issue requirement was met, which looks to whether "'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are

the same." *Id.* at 342. He admitted that the "relevant findings" of the Secretary included the lack of a causal nexus between Plaintiff's termination and his whistle-blowing activity (AOB 5), thus satisfying the "necessarily decided" requirement. *Lucido*, 51 Cal. 3d at 342 (requirement met so long as issue was not "'entirely unnecessary' to the judgment in the initial proceeding"). The Secretary's decision was on the merits and final under the terms of the AIR21 statute. 49 U.S.C. §42121(b)(2)(A). The "same party" requirement is also obviously met. Plaintiff has thus waived any challenge to any of these criteria. *Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (plaintiff waives argument by failing to raise in district court or in briefs on appeal).

There can also be no reasonable dispute that the causation issue was "actually litigated" before the Department of Labor. "An issue is actually litigated 'when it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *Sims*, 32 Cal. 3d at 484 (quoting RESTATEMENT (SECOND) OF JUDGMENTS §27 cmt. d (1982)) (alterations omitted). Plaintiff concedes that he submitted a complaint to the Secretary of Labor, alleging that Alaska Airlines retaliated against him due to his whistle-blowing activities. ER 123; AOB 4. He also concedes that the Secretary investigated his complaint and eventually found it to be meritless based on the lack of a causal nexus between Plaintiff's whistle-blowing and the adverse employment actions he experienced. AOB 4-5.

Plaintiff's failure to request a hearing before an ALJ does not alter this conclusion. What is relevant is that Plaintiff "was entitled to a full hearing and [would have] had ample opportunity to raise issues and present evidence at that hearing." *Castillo*, 92 Cal. App. 4th at 482; *see also Sims*, 32 Cal. 3d at 484. Because Plaintiff raised and submitted the causation issue for determination, was provided the full opportunity to litigate the issue and received a determination on that issue, causation was "actually litigated" before the Department of Labor.

C. Numerous Public Policies Support Applying Collateral Estoppel To The Secretary's Decision That Plaintiff Was Not Terminated As The Result Of Whistle-Blowing.

The final *Sims* test is whether application of collateral estoppel to a particular administrative decision "would further the traditional public policies underlying application of the doctrine." *Sims*, 32 Cal. 3d at 488. This test is met here for multiple reasons. Indeed, application of collateral estoppel in this context is supported not only by the reasons applicable when courts give preclusive effect to the decisions of *state* administrative agencies, but also by the strong federal policies embodied in the AIR21 statute and the general policy in favor of federal-state comity.

1. Applying Collateral Estoppel To The Secretary's Determination Is Necessary To Further The Strong Federal Policies Embodied In 49 U.S.C. §42121(b)(4).

As this Court recently held, whether a plaintiff's civil claims remain viable following an administrative proceeding is a matter of statutory intent. *See Miklosy v. Regents of the Univ. of California*, No. 5139133, —Cal. 4th—, 2008 WL 2923434, at *5 (July 31, 2008) (construing provisions of Whistleblower Act applicable to the University of California). In this case, the relevant statute is a creation of federal law, not state law, but the principle is the same.

The AIR21 statute provides, "If a hearing [before an ALJ] is not requested in such 30-day period [after the date of notification of the Secretary's findings], the preliminary order shall be deemed *a final order that is not subject to judicial review*." 49 U.S.C. §42121(b)(2)(A) (emphasis added); *see also* 29 C.F.R. §1979.106(b)(2) (2007).[6] It is

[6]Although the statute is plain on its face, both the WPP's congressional history and the regulations implementing the WPP clarify that a failure to seek review of the Secretary's preliminary order constitutes a final decision that is not subject to judicial review. *See* H.R. REP. NO. 106-167(I), at 121 (1999), 1999 WL 355951 (stating that Section 42121(b)(4)(B) "prohibits a person from challenging the final order in another judicial proceeding if it could have been appealed under sub-
(continued . . .)

undisputed that Plaintiff failed to request an on-the-record hearing before an ALJ. This Court should therefore defer to Congress' expressed intent that failure to timely request (or, in this case, to request at all) a hearing before an ALJ results in a final decision not subject to judicial review.

Indeed, failing to give preclusive effect to the ALJ's findings would undermine public confidence in the administrative scheme established by Congress in AIR21. If a party could voluntarily initiate an administrative proceeding before the agency only to turn around and relitigate the exact same claims in court following an unfavorable decision by the Secretary, the administrative proceedings would become a mere dress rehearsal for a subsequent court action. It would be difficult to imagine more disrespectful treatment for an administrative procedure that Congress expressly vested with finality.

Moreover, accepting the contrary position would turn DOL's administrative process into a one-sided proceeding that no defendant could ever win. Assume, for example, that instead of dismissing Plaintiff's complaint, the Secretary had found that Plaintiff had been terminated for whistle-blowing and ordered his reinstatement with back pay pursuant to 49 U.S.C. §42121(b)(3)(B). In that event, Alaska Airlines could not have gone to state court and sought declaratory relief that the termination was unconnected to whistle-blowing. If Alaska Airlines is bound by an adverse Secretarial decision, Plaintiff should be bound as well. A contrary ruling would create an administrative procedure in which the plaintiff can win (by obtaining a binding decision against the defendant) but the defendant at best can secure only a tie (because a victory would leave plaintiff free to relitigate his or her claims in state court). This "heads I win, tails you lose" approach would give plaintiffs an incentive to drain the resources of both administrative agencies and California's courts. This could not have been what Congress intended in providing that

---

(. . . continued)
paragraph (A) above"); *see also* 29 C.F.R. §1979.106(b)(2) (2007).

the Secretary's administrative decision, if not appealed, "shall be deemed a final order that is not subject to judicial review." 49 U.S.C. §42121(b)(2)(A).

Moreover, applying collateral estoppel here is also consistent with federal administrative law. "We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). Thus, where Congress evinces a clear intent to preclude judicial review of final administrative decisions, a failure to properly appeal a final order is subject to preclusive effect. *See Tice v. Bristol-Myers Squibb Co.*, 515 F. Supp. 2d 580, 584 (W.D. Pa. 2007) (where plaintiff failed to appeal ALJ's decision dismissing whistle-blower complaint under Sarbanes-Oxley Act, the decision became a final order under the statute and "plaintiff is collaterally estopped from relitigating the factual issues resolved by the ALJ"); *Tobak v. Apfel*, 195 F.3d 183, 188 (3d Cir. 1999) (denial of plaintiff's social security benefits application became final when plaintiff failed to timely appeal, and "the absence of a hearing on [plaintiff's] prior application does not affect the finality of that proceeding, nor does it affect our determination that *res judicata* was properly applied in this case"); *Rhoades v. Casey*, 196 F.3d 592, 602 (5th Cir. 1999) (plaintiff's claim that consent agreement with state administrative agency was unenforceable barred by res judicata where agreement "clearly stated that it was a final order" and plaintiff "never requested an administrative hearing on the merits of the . . . order, and did not seek judicial review of the order"); *Navan v. Astrue*, No. 06 Civ. 2757 (AKH), 2007 WL 1834830, at *5-7 (S.D.N.Y. June 20, 2007) (applying res judicata to Social Security Administration's determination that plaintiff was not disabled where plaintiff failed to exercise his right to a hearing before an ALJ; failure to exercise this right resulted in a final determination that was no longer subject to reopening). The same result should follow here.

2. Applying Collateral Estoppel Will Also Promote Several Important Policies Embodied In California Collateral Estoppel Law, Such As Promoting Judicial Economy And Integrity And Protecting Litigants Against Repetitive Litigation.

Applying collateral estoppel here would further numerous strong state policies in addition to the federal policies just discussed. These policies include promoting judicial economy and integrity and protecting litigants from repeated litigation. *See Sims*, 32 Cal. 3d at 488-89.

First, applying collateral estoppel to the Secretary's findings will promote judicial economy by minimizing repetitive litigation. *Id.* at 488. The AIR21 statute—like the other federal whistle-blower protection statutes—gives complainants strong incentives to invoke administrative proceedings. If the Secretary finds a statutory violation, she *must* provide relief that includes the complainant's *immediate* reinstatement with back pay and other compensatory damages. 49 U.S.C. §42121(b)(3)(B). This federal scheme thus gives plaintiffs a choice: speedy but limited remedies from the Department of Labor, or broader but less immediate remedies from state (or federal) court. That framework lets individuals choose the balance that suits their interests, while sparing both administrative agencies and courts some of the caseload that a lack of choice would create.

That framework should not allow plaintiffs who initiate federal administrative proceedings to treat an unfavorable outcome as an advisory opinion by requiring California's courts to relitigate issues previously decided by the Secretary.[7] As this Court has found,

---

[7]To the extent Plaintiff was dissatisfied with the process he could have sought to formally withdraw his AIR21 Complaint as set forth in the applicable regulations. *See* 29 C.F.R. §1979.111(a) (2007). Plaintiff opted instead for the "have your cake and eat it too" approach whereby he would either be entitled to immediate remedies from the Department of Labor (if he was victorious), or relitigate the exact same claims in court (if he was unsuccessful before the Department).

denying preclusive effect to an administrative agency's findings would "undermine the efficacy of such proceedings, rendering them in many cases little more than rehearsals for litigation." *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 72 (2000); *see also Knickerbocker v. City of Stockton*, 199 Cal. App. 3d 235, 243 (1988) ("it would render the administrative hearing a meaningless and idle act"). "To hold otherwise would . . . impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution." *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 107-08 (citation omitted).

Second, giving efficacy to the Secretary's administrative decision will strengthen the integrity of California's judicial system. As this Court has stated, the possibility of inconsistent judgments could undermine the integrity of *both* the judicial system and the administrative hearing process, causing "both decisions [to] become suspect." *Garcia*, 39 Cal. 4th at 1079 (citing *Sims*, 32 Cal. 3d at 488).

Third, public policy is served by protecting parties from endless litigation. *Rymer*, 211 Cal. App. 3d at 1180-81 (citation omitted). The issues Plaintiff asserts in this action are identical to those he asserted in the administrative proceeding. Those issues were resolved against him based on documentary evidence and witness testimony. Litigants should not have to defend against administrative claims knowing that the plaintiff will be able to pursue the exact same claims in court if he or she loses before an administrative decision-maker.

In contrast, no countervailing policy is served by denying collateral estoppel in this case. Plaintiff cannot complain that the federal administrative process he voluntarily invoked was unfair. Although he may not have been given the full panoply of trial-type rights at the first stage of the administrative process, he had the right to review the Secretary's decision, first by an ALJ after a trial-type hearing, and second, by a federal Court of Appeals. Having failed to

invoke either remedy, Plaintiff should not be afforded another bite of the same apple.

II.

APPLICATION OF COLLATERAL ESTOPPEL TO THIS CASE IS ALSO SUPPORTED BY PLAINTIFF'S FAILURE TO EXHAUST JUDICIAL REMEDIES.

The doctrine of exhaustion of judicial remedies provides that "unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding . . . those findings are binding in later civil actions." *Johnson*, 24 Cal. 4th at 69-70. As this Court explained in that case,

> Exhaustion of judicial remedies . . . is necessary to avoid giving binding "effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action." (*Id.* at 70 (citation omitted))

In *Johnson*, plaintiff was an assistant city manager who claimed he was terminated in retaliation for complaining about the sexual discrimination of a coworker and administratively challenged his dismissal. *Id.* at 66. The administrative process concluded with a finding that the dismissal was for economic reasons. *Id.* Rather than filing an administrative mandamus action as required by statute, plaintiff filed a complaint with the Department of Fair Employment and Housing, obtained a right-to-sue letter, and filed a civil action two years after his dismissal. *Id.* at 66-67. This Court held that plaintiff's "fail[ure] to seek timely judicial relief from the City's administrative determination" (*id.* at 71) resulted in a final administrative decision that precluded his FEHA claim: "[W]hen, as here, a public employee pursues administrative civil service remedies, receives an adverse finding, and fails to have the finding set aside

through judicial review procedures, the adverse finding is binding on discrimination claims under the FEHA." *Id.* at 76.[8]

The recent Court of Appeal decision in *CALPERS v. Superior Court*, 160 Cal. App. 4th 174, 177 (2008), is directly analogous to this case. There the plaintiff filed a whistle-blower complaint with the State Personnel Board ("SPB").[9] Like the Secretary's investigation of Plaintiff's complaint under the AIR21 statute, the SPB investigation was based on "evidentiary submissions," which allowed plaintiff to "submit evidence, name witnesses, and argue his claim," but specifically did *not* include an evidentiary hearing. *Id.* at 177, 183. Pursuant to this investigation, the SPB issued a decision recommending the dismissal of plaintiff's complaint in its entirety. *Id.* at 178. After unsuccessfully attempting to obtain an evidentiary hearing before the SPB, Plaintiff filed a civil action rather than challenging the adverse findings by mandamus. *Id.* The Court of Appeal held that the unchallenged SPB findings—made in a quasi-judicial proceeding—precluded plaintiff's civil action:

> Since, as we have concluded, the SPB's decision was made as the result of a proceeding in which evidence was required to be given and considered by the executive officer, its validity can be challenged by a petition for a writ of mandate. Here, plaintiff chose not to challenge the adverse findings by way of a petition for a writ. As a result, those findings cannot be relitigated in a whistleblower civil action

---

[8]The Courts of Appeal had reached similar conclusions even before this Court's decision in *Johnson*. *See Swartzendruber v. City of San Diego*, 3 Cal. App. 4th 896, 904-06 (1992) (where plaintiff failed to seek timely review of administrative action as required by statute, subsequent claims based on same primary right—right to continued employment—were barred); *Oquendo v. California Inst. for Women*, 212 Cal. App. 3d 520, 522 (1989) (where plaintiff failed to challenge by mandamus an adverse determination by the SPB regarding his reasonable accommodation claim, plaintiff's subsequent court action was barred).

[9]The SPB is an administrative agency endowed by the California Constitution with quasi-judicial powers. *Larson v. State Personnel Bd.*, 28 Cal. App. 4th 265, 273 (1994).

and respondent court erred by overruling PERS's demurrer. (*Id.* at 183)

"The concept of exhaustion of judicial remedies is rooted in the principles embodied in collateral estoppel." *Id.* at 180. And there is not the slightest doubt that Plaintiff has failed to exhaust his judicial remedy. When he failed to appeal the Secretary's administrative determination that his termination was not the result of his whistle-blowing activities, he waived not only *administrative* review of the Secretary's decision before an ALJ, but also *judicial* review of the ALJ's decision by a federal court of appeals. *See* 49 U.S.C. §42121(b)(4). Consequently, he has failed to exhaust both administrative and judicial remedies.

As this Court explained in *Johnson*, the latter waiver makes the administrative decision final for purposes of collateral estoppel. The Secretary's decision therefore bars any subsequent judicial proceeding based on the same retaliation claim that the Plaintiff unsuccessfully presented to DOL.

CONCLUSION

This case gives the Court the opportunity to provide a clear and resounding warning to future litigants who first initiate an administrative proceeding and who then ask the courts to relitigate issues decided against them by the administrative agency: "Would-be plaintiffs ignore adverse administrative findings at their peril." *CALPERS*, 160 Cal. App. 4th at 180. For the multiple policy reasons set forth above, the Court should answer the question certified by the

Ninth Circuit and hold that collateral estoppel applies to the Secretary of Labor's decision that there was no causal link between Plaintiff's whistle-blowing activities and his subsequent termination.

DATED: August 18, 2008.

Respectfully,

DAVID J. REIS
JASON M. HABERMEYER
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

By /David J. Reis/ JMH
DAVID J. REIS

Attorneys for Defendant, Appellee and Petitioner Alaska Airlines, Inc.

CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.520(c)(1))

Pursuant to California Rule of Court 8.520(c)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the attached Alaska Airlines' Opening Brief On The Merits contains 8,031 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: August 18, 2008.

By David J. Reis /JMH
DAVID J. REIS

Attorneys for Defendant, Appellee and Petitioner Alaska Airlines, Inc.

PROOF OF SERVICE BY FEDERAL EXPRESS

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

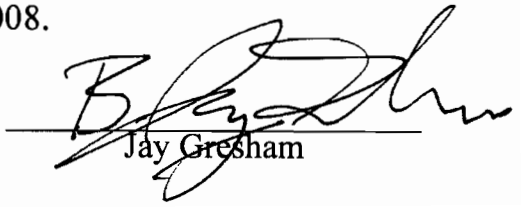
I am readily familiar with the practice for collection and processing of documents for delivery by overnight service by Federal Express of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the document(s) are deposited with a regularly maintained Federal Express facility in an envelope or package designated by Federal Express fully prepaid the same day as the day of collection in the ordinary course of business.

On August 18, 2008, I served the following document(s) described as **ALASKA AIRLINES' OPENING BRIEF ON THE MERITS** on the persons listed below by placing the document(s) for deposit with Federal Express through the regular collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, Seventh Floor, San Francisco, California, to be served by overnight Federal Express delivery addressed as follows:

James P. Stoneman, II
Law Offices of James P. Stoneman, II
100 West Foothill Boulevard
Claremont, CA 91711

Clerk of Court
Ninth Circuit Court of Appeals
James R. Browning United States Courthouse
95 Seventh St.
San Francisco, CA 94103-1518

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at San Francisco, California, on August 18, 2008.



Jay Gresham