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BY CM/ECF

Catherine O'Hagan Wolfe, Esq.
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: *Berman v. Neo@Ogilvy LLC,* No. 14-4626

Dear Ms. Wolfe:

The Interpretation released by the SEC, and rushed to this Court the next day, (which reiterates the SEC's arguments to this Court), serves to lock the SEC into its incorrect position that the word "whistleblower" has "two separate definitions" to be applied in different sections of the same statute and that, in the anti-retaliation section, the definition of "whistleblower" contained in the statute should be ignored. But this "Interpretation" cannot change the clear and *only* definition in the statute.

The SEC's position that the word "whistleblower" has "two separate definitions" is squarely contradicted by the fact that the statute has one definition and uses the word "means" which, according to overwhelming authority, indicates that the definition is exclusive. Indeed, the SEC acknowledges that one of its definitions contradicts the clear language of the statute. It says that the "first" defininition, in Rule 21F-2(a), "mirrors the statutory definition of whistleblower," while the "second" definition, which it admits it "promulgated," does not.[1] Thus, without authority to do so, the SEC is excising the phrase "to the Commission" from the statutory definition of whistleblower. And it is now even clearer that in order for Appellant to prevail, the Court would have to find not only that the statute is ambiguous, but also that the SEC has the power to "promulgate" a definition that contradicts the one that Congress wrote.

In sum, the SEC's Interpretation attempts to explain away an inconsistency within its own Rules that demonstrates that its argument on this appeal was not reasonable. It asks this Court to hold, therefore, that an exclusive definition is really not exclusive at all.

[1] 2015 WL 4624264, at *2.

But here, where the statute is clear, the statutory language governs, and the SEC's "Interpretation" is irrelevant.[2]

Further, as noted in Appellees' Rule 28(j) letters, two recent Supreme Court decisions state that the Court should look to the overall objective of the statute, which supports Appellees' position.

Respectfully submitted,

By: /s/ Howard J. Rubin

[2] Notably, *Auer v. Robbins* is inapplicable, as it addressed the Department of Labor's interpretation of its own regulation, not its interpretation of an act passed by Congress.