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May 26, 2015

**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:

We represent Appellees and write in response to the SEC's May 21, 2015 letter.

While Rule 28(j) permits parties to advise the circuit clerk of pertinent and significant authorities, the *Somers* case is not significant. Indeed, Appellees cite to several similar district court decisions. However, multiple other district courts – and the only Court of Appeals that has decided this issue – have held that only individuals who report to the SEC are whistleblowers protected from retaliation under Dodd-Frank. The existence of one additional out-of-circuit district court decision is not significant.

Moreover, the SEC's arguments should not persuade this Court to reverse the well-reasoned decision of Judge Woods. First, both the *Somers* Court and the SEC acknowledge that reporting regimes under SOX that require auditors/attorneys to report internally before providing information to the SEC afford those individuals protection from retaliation under SOX. There is no reason that they need to be protected under both SOX and Dodd-Frank for the same conduct.

The SEC's second reason contradicts its first. The SEC argues that protection under SOX and Dodd-Frank for the same internal reporting would not render Section 806 of SOX a "dead letter" because individuals might still prefer to pursue SOX claims. If SOX provides robust protection from retaliation, however, then there is no need for Dodd-Frank to protect the same conduct where individuals do not meet the definition of "whistleblower" under Dodd-Frank.

Third, adopting the SEC's interpretation of Dodd-Frank does not eliminate a two-tiered whistleblower reporting structure since the SEC admits that some individuals will still

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report internally and avail themselves of SOX. Finally, attorneys/auditors will not stop reporting internally because they are *required* to report internally. And, if they are retaliated against before providing information to the SEC, they are protected under SOX.

Respectfully submitted,

By:           /s/ Howard J. Rubin