UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 14-4626

DANIEL BERMAN, Plaintiff - Appellant, vs. NEO@OGILVY LLC and WPP GROUP USA, INC., Defendants - Appellees.	On appeal from the United States District Court for the Southern District of New York 1:14-CV-00523-GHW-SN

APPELLANT'S REPLY BRIEF

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POINT I

THE INCONSISTENCY WITHIN DODD FRANK CAN BE LOGICALLY RECONCILED ONLY BY ADOPTING THE SEC'S INTERPRETATION AND FINDING THAT BERMAN IS PROTECTED AGAINST RETALIATION UNDER DODD FRANK FOR MAKING DISCLOSURES PROTECTED BY SOX

Although Appellees go to great lengths to muddy the waters, the Court should not lose sight of the fundamental inconsistency within Dodd Frank that is at the heart of this case. The anti-retaliation provision of Dodd Frank, 15 U.S.C. § 78u–6(h)(1)(A)(iii), protects persons who, like Appellant Daniel Berman ("Berman"), have made reports of wrongdoing that are "required or protected" under the Sarbanes-Oxley Act of 2002 ("SOX"). Among the reports protected under SOX are internal corporate reports of wrongdoing made to a "person with supervisory authority over the employee." 18 U.S.C. § 1514A(1)(c). Logically, since such reports are protected by SOX, and since Dodd Frank protects from retaliation persons who make disclosures protected by SOX, Berman should be protected from retaliation under Dodd Frank.

Yet, in a contradiction that should be self-evident, Dodd Frank elsewhere defines a "whistleblower" solely in terms of persons who provide information to the SEC, effectively excluding persons who make internal reports under SOX. 15 U.S.C. § 78u–6(a)(6).

The SEC, after notice-and-comment rulemaking, reconciled the conflict within Dodd Frank through 17 C.F.R. § 240.21F-2(b)(1) ("Rule 21F-2(b)"), which confirms that an individual is a whistleblower ***for the purposes of the anti-retaliation provision of Dodd Frank*** if the person provides information in the manner described in 15 U.S.C. § 78u–6(h)(1)(A), the subsection that protects disclosures to corporate superiors pursuant to SOX. 17 C.F.R. § 240.21F-2(b)(1)(ii). Under Rule 21F-2(b), Berman falls within the ambit of Dodd Frank's anti-retaliation protection. Because Rule 21F-2(b) provides a reasonable resolution of the contradictory terms of Dodd Frank, it is entitled to deference from the Court, and the District Court's dismissal of Berman's claims was in error. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Appellees and the Chamber of Commerce of the United States of America ("Chamber"), arguing as amicus curiae, mount several challenges to what should be a clear and simple matter of deference to agency interpretation under *Chevron*. For a host of reasons, the Court should reject these challenges and find that the definition of whistleblower set out in Rule 21F-2(b) controls here.

As a threshold matter, Appellees and the District Court seem to labor under the mistaken impression that the anti-retaliation provision is the only section of Dodd Frank to which the statutory definition of whistleblower might apply. They

apparently ignore the numerous other uses of the term in the statute, such as the provision for paying awards to whistleblowers, 15 U.S.C. § 78u-6(b); the provision allowing whistleblowers to be represented by counsel, 15 U.S.C. § 78u-6(e); the confidentiality protections, 15 U.S.C. § 78u-6(h)(2); and the provision relating to false information provided by whistleblowers. 15 U.S.C. § 78u-6(i). Thus, giving appropriate deference to Rule 21F-2(b) does not render the definition of "whistleblower" set out in Dodd Frank superfluous or meaningless. Rule 21F-2(b) "expands" the definition of a whistleblower ***solely in the context of Dodd Frank's anti-retaliation protections***. The more limited definition of a whistleblower continues to apply to ***all other sections of Dodd Frank*** in which the term is used.

Appellees' contention that Rule 21F-2(b) is not entitled to deference because Section 21F itself is contradictory demonstrates the same profound misunderstanding of the structure of the statute and its regulations. Rule 21F-2 establishes two independent paths to "whistleblower" status. The first path is established by Rule 21F-2(a), which sets forth the ***generally applicable definition*** of whistleblower as someone who provides information to the SEC. 17 C.F.R. § 240.21F-2(a). This generally applicable definition applies to, among others, persons seeking awards as whistleblowers under Dodd Frank. 17 C.F.R. § 240.21F-2(a)(2). The second path to qualify as a whistleblower is established by Rule 21F-2(b), and

is available only ***"[f]or purposes of the anti-retaliation protections afforded by [Dodd Frank]."*** 17 C.F.R. § 240.21F-2(b)(1).

These two paths to whistleblower status are not inconsistent. Rule 21F-2(a) applies to determine if someone is a whistleblower for purposes of receiving an award and invoking the confidentiality protections of Dodd Frank. Rule 21F-2(b)(1), by contrast, provides a broader definition that governs when someone is a whistleblower ***for the limited purposes of obtaining the anti-retaliation protections*** of Section 21F(h)(1) of the Exchange Act.

Rule 21F-9, cited by Appellees [Appellees Br. at 32-33], applies only to Rule 21F-2(a) whistleblowers -- *i.e.*, those who are seeking to be whistleblowers for purposes of the award and confidentiality provisions. 17 C.F.R. § 240.21F-9. Rule 21F-9 does not apply to the Rule 21F-2(b) anti-retaliation definition of whistleblower. Reading over the entirety of Section 21F, it is clear that all of the many rules after Rule 21F-2(b) deal exclusively with the award and confidentiality components of the whistleblower program, not the anti-retaliation protections. There is no contradiction here, and no reason to disregard the SEC's resolution of the conflict within Dodd Frank.

The SEC's interpretation of the conflicting meanings of whistleblower found in Dodd Frank allows a meaningful place for both the general definition of whistleblower found in 15 U.S.C. § 78u–6(a)(6) and the full text of the anti-

retaliation provision. By contrast, Appellees' reading of the statute renders subsection (i) of the anti-retaliation provision completely extraneous and unnecessary. Subsection (i) protects whistleblowers from retaliation for "providing information to the [SEC] in accordance with this section." If, as Appellees contend, a whistleblower protected from retaliation can only ever be someone who reports wrongdoing to the SEC, then this subsection is unnecessary because it is already encompassed in the definition of a whistleblower.

Even more significantly, if the Court adopts Appellees' view that the only conduct protected by the anti-retaliation provision of Dodd Frank is reporting wrongdoing to the SEC, then the existence of subsection (iii) of 15 U.S.C. § 78u–6(h)(1)(A) makes no sense at all. Unlike subsections (i) and (ii), subsection (iii) does not specify communicating with, reporting to, testifying before or cooperating with the SEC. This absence is just as significant as the reference to the SEC in the statutory definition of "whistleblower," and cannot be ignored as Appellees would have the Court do.

Further, under Appellees' reading of the statute, one is left to wonder why Congress included disclosures "required or protected" under SOX in the anti-retaliation provision if Congress did not intend persons who make such disclosures to enjoy the full measure of Dodd Frank anti-retaliation protection. In the words of one recent decision, "[t]his Court will not attribute to Congress an intent to offer a

broad array of protections with one hand, only to snatch it back with the other, leaving behind protection for only a narrow subset of whistleblowers." *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 (D. Neb. 2014). There is certainly no clear and decisive legislative history reflecting such an intent. Instead, the legislative history of Dodd Frank focuses primarily on the "bounty" program for whistleblowers, devoting very little discussion to the anti-retaliation provisions. *See* Dodd Frank Act, Pub.L. 111–203, Title IX, § 922(a), 124 Stat. 1841 (2010); *see also Bussing*, 20 F. Supp. 3d at 731 (discussing very limited legislative history of Dodd Frank anti-retaliation provisions); *Egan v. TradingScreen, Inc.*, No. 10 CIV. 8202 LBS, 2011 WL 1672066, at *4 (S.D.N.Y. May 4, 2011) (same). This is precisely the sort of situation where the SEC, as the agency charged with administering and enforcing Dodd Frank, can and should step in to resolve the lack of clarity left by Congress, and it is precisely the situation where such resolutions are entitled to deference by the courts.

Trying to manufacture some weakness in the SEC's eminently reasonable resolution to the inherent inconsistency within Dodd Frank, the Chamber contends that Rule 21F-2(b) somehow is not entitled to deference because the SEC, in promulgating that Rule, "never purported to be exercising discretion to resolve a statutory ambiguity." [Chamber Br. at 21-22]. However, no case law or statute imposes on the SEC an obligation to state expressly that it is enacting a regulation

to resolve a statutory ambiguity. The cases cited by the Chamber stand only for the limited proposition that, where an agency expressly states that a specific "interpretation is compelled by Congress," *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002), then the agency's interpretation will not be afforded *Chevron* deference. That proposition simply does not apply here.

Here, Rule 21F-2(b) makes plain on its face that the SEC is establishing a limited definition of whistleblower that is different than the statutory definition found in Dodd Frank, and that this new limited definition applies solely for purposes of the anti-retaliation protections. Given that it adopts a definition that is different from, and a limited exception to, the definition of whistleblower that Congress established, Rule 21F-2(b) cannot fairly be read as having been "compelled by Congress." *Cf. Assoc. of Private Sector Colleges v. Duncan*, 681 F.3d 427, 444-45 (D.C. Cir. 2012) ("[I]t would be a stretch, to say the least, to hold that the [agency's] use of the word 'clear' demonstrates that the agency meant to suggest that its regulatory interpretation was 'compelled by Congress.'"). The language that the Chamber cites from the SEC's release accompanying the adoption of the final whistleblower rules does not demonstrate otherwise. The language in footnote 38 stating that "internal reporting is expressly protected" by Dodd Frank is simply stating the obvious – namely, that the statute covers internal reporting. Nowhere in that footnote did the SEC expressly suggest that the statute "compels" the conclusion

that internal reporting is protected even if the individual has not reported wrongdoing to the SEC.

The Chamber further mistakenly relies on *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), and *Stoneridge Inv. Partners v. Scientific-Atlantic*, 552 U.S. 148, 164-65 (2008), for the proposition courts cannot be guided by the "broad remedial goals" of the securities laws when interpreting the scope of a private cause of action under those laws. However, both *Bank of Denver* and *Stoneridge* deal with judicially-implied private rights of action. Here, the private right of action invoked by Berman is an ***express*** one, clearly set forth in the text of Dodd Frank. In the similar context of an express private right of action under SOX, the Supreme Court recently took the opposite approach, construing the statute broadly to effectuate the statutory objectives. *Lawson v. FMR LLC*, --- U.S. ---, 134 S.Ct. 1158, 1172, 188 L. Ed. 2d 158 (2014) (reversing the First Circuit's decision which construed private right of action under Section 806 of SOX narrowly). Therefore, this Court can and should look to the remedial goals of both Dodd Frank and SOX to determine whether permitting Berman and people like him to be protected from retaliation as whistleblowers is right and sensible.

Finally, the Chamber contends that the SEC's decision to resolve the inconsistency within Dodd Frank by granting anti-retaliation protection to persons making internal reports protected by SOX was unreasonable because "promoting

internal reporting was not Congress's purpose in enacting Dodd-Frank's whistleblower provision."[1] [Chamber's Br. at 18]. The Chamber ignores the many sound and legitimate reasons why an employee might opt to report potential wrongdoing internally first, before reporting to the SEC. As the *Bussing* Court noted:

> Many whistleblowers are not motivated by financial gain, and so the bounty program simply may not factor into their decision. Some employees may be driven by loyalty (misplaced or not) to give their companies a chance to remedy violations before calling in the SEC. And there are no doubt others who are simply not savvy enough to know that they should take the counter-intuitive step of first reporting to the SEC if they want any protection for internal reporting.
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> * * *
>
> Nor is it logical to conclude that Congress intended to encourage an across-the-board departure from the general practice of first making an internal report. Internal reporting serves a number of important interests—shared by employers and the SEC. It allows companies to remedy improper conduct at an early stage, perhaps before it rises to the level of a violation. SEC, Securities Whistleblower Incentives and Protections, 76 Fed.Reg. 34300–01, 2011 WL 2293084, at *34324 (August 12, 2011). Requiring employees to report first to the SEC

[1] Interestingly, the Chamber took the opposite position in comments to the SEC during the rule-making process for Rule 21F. In a December 17, 2010 comment letter filed with the SEC, which is a matter of public record, the Chamber called for the adoption of "a significant incentive for using [companies'] internal channels" to ensure that the Whistleblower Program does not create "an irresistible temptation [for employees] to go to the SEC with their report." Indeed, the Chamber warned that without such incentives, "[e]mployees may also seek to hedge their bets by lodging complaints with both the SEC and the company at the same time," a result the Chamber strongly opposed. Further, the Chamber expressly argued that Congress had provided the SEC with rulemaking authority to mandate that whistleblowers first report internally before coming to the Commission.

> would also risk frustrating companies' internal compliance programs, and could deter whistleblowers from participating in internal investigations. *Id.*
>
> Internal reporting may also prevent simple misunderstandings -- where an employee is mistaken, and there has been no legal violation -- from transforming into investigations that waste corporate and government resources. *Id.* In other words, it will help vet the tips to the SEC, so that the SEC receives fewer and higher quality reports from whistleblowers. *Id.*

Bussing, 20 F. Supp. 3d at 731-32. These same considerations combined with Congress's statement that persons making reports "required or protected" by SOX, support the SEC's decision to extend anti-retaliation protection to internal reports of wrongdoing.

In sum, the Court has before it a nearly textbook example of when *Chevron* deference is required – an internally inconsistent statute, multiple possible readings of the statute, and an agency charged with overseeing that statute applying expertise and the formal rule-making process to resolve the inconsistency. The Court should reject the short-sighted analysis of the District Court, Appellees and the Fifth Circuit and find, consistent with the majority of courts, that Rule 21F-2(b) controls, affording Berman with a valid anti-retaliation claim.

POINT II

BERMAN ADEQUATELY PLEAD THE NECESSARY ELEMENTS OF HIS ANTI-RETALIATION CLAIM

Appellees challenge not only Berman's right to anti-retaliation protection under Dodd Frank but also the adequacy of Berman's Complaint. For several reasons, this challenge should be rejected.

Appellees would have the Court read Dodd Frank extremely narrowly, protecting against retaliation only those who report conduct in violation of the securities laws. [*See, e.g.*, Appellees' Br. at 38-41]. But Dodd Frank is not so limited. In fact, Dodd-Frank extends the protection against retaliation to persons who have made disclosures that "***are required or protected under [SOX]***." 15 U.S.C. § 78u-6(h)(1)(A)(iii) (emphasis added). SOX, in turn, protects disclosures made by employees concerning "any conduct which the employee reasonably believes" may violate, among other things, any rule or regulation of the SEC, "***or any provision of Federal law relating to fraud against shareholders***." 18 U.S.C. § 1514A(a)(1) (emphasis added); *see also Sylvester v. Parexel Int'l LLC*, ARB No. 07–123, 2011 WL 2165854, at *14-*15 (ARB May 25, 2011) (holding that, to invoke anti-retaliation protection, disclosure need only concern "one of the six enumerated categories of violations set forth in" Section 1514A(a)(1) of SOX).

Thus, reporting conduct that may mislead shareholders, such as accounting-related issues likely to result in inaccurate or false reports, makes one a protected

whistleblower under SOX and, in turn, under the anti-retaliation provisions of Dodd Frank. *See, e.g.*, *Wood v. Dow Chemical Corp.*, Case No. 14-cv-13049, 2014 WL 7157100 at *8 (E.D. Mich. Dec. 15, 2014) (holding that allegations of improper personal expenditures and improper charitable contributions adequately supported anti-retaliation claim because a reasonable person could find them "inconsistent with shareholder interests"); *Feldman v. Law Enforcement Assocs. Corp.*, 779 F. Supp. 2d 472, 491-92 (E.D.N.C. 2011) (holding that allegations that defendant violated SEC rules governing internal accounting controls adequately set forth anti-retaliation claim under SOX); *Smith v. Corning Inc.*, 496 F. Supp. 2d 244, 248-49 (W.D.N.Y. 2007) (holding that complaint adequately alleged anti-retaliation claim where plaintiff alleged reporting errors and GAAP violations that could have misled investors).

Here, Berman pled his reasonable belief that people at Neo and WPP were engaged in conduct that amounted to fraud on WPP shareholders. [JA0025-26] The various identified accounting transactions that violated GAAP accounting and WPP policies had the net effect of improperly inflating Neo's profits, thereby deceiving WPP shareholders about the financial status of the company. [JA0026-28] Berman further pled the basis for his reasonable belief – namely, his job position and expertise in the fields of accounting and compliance. [JA0024] These allegations

establish that Berman's reports were "protected under [SOX]" and that Berman therefore can invoke the anti-retaliation protections of Dodd Frank.

The fact that Berman's job responsibilities as Financial Director included reviewing accounting procedures and reports and detecting and correcting errors as necessary [*see* JA0022, JA0024], does not exclude him from protected status under SOX. The law in this Circuit is clear that an employee may engage in protected whistleblowing activity even where detecting and reporting potential wrongdoing is part of his ordinary job duties. *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 529-30 (S.D.N.Y. 2014); *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012); *see also Robinson v. Morgan-Stanley,* Case No. 07-070, 2010 DOLSOX LEXIS 7 (ARB Jan. 10, 2010), at *24-*25 ("[Section 1514A] does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties."), *petition denied*, Case No. 10-CV-1587 (7th Cir. Dec. 27, 2010). Thus, even assuming Berman was simply performing his job, reporting his reasonable suspicious of wrongdoing that constituted fraud on shareholders still falls into the category of communications "required and protected" by SOX.

Equally unavailing is Appellees' reliance on statements made by Berman's counsel at oral argument before Magistrate Judge Netburn. [Appellees Br. at 38-

39]. Far from conceding that Berman's claims lacked merit, Mr. Meisner's oral argument repeatedly emphasized the seriousness of the allegations:

> [T]here is some very, very serious allegations that are so far over the line that they almost touch criminal conduct. And they clearly touch the third rail of accounting and SEC regulation, which is financial statements need to be pristine. [JA0128]
>
> * * *
>
> Going back to the general issue, look, Mr. Berman has pleaded a very, very strong and very serious -- the utmost, most serious claim you can possibly claim in SEC world. Presenting shareholders with fake -- with fraudulent information done intentionally, done in certain cases in order to enrich executives. It is unbelievable. [JA0134]

In the sections of argument cherry-picked by Appellees, Berman's counsel was arguing merely that one of the alleged categories of wrongdoing – improperly using vendor money – was a minor issue as compared to the very egregious wrongdoing involved in the reversed accounting reserves. For example, the "little red herring problem" statement referred only to the Court's focus on what counsel considered to be the least strong of Berman's allegations

> I've got a little red herring problem going over here. Some of these vendor, ***using vendor money inappropriately*** issues, policy issues, I am going to ***reserve on that*** and try to direct your attention right back to ***what I'm calling the third rail, holy grail of intentionally putting out false numbers and circumventing accounting rules, SEC regulations, internal policies*** intended to prevent this stuff. Circumventing all that stuff so they can paint a fake picture of Neo's unit's accounting which of course then tainted Ogilvy. [JA0130]

Magistrate Judge Netburn clearly understood Mr. Meisner's argument for what it was:

> You allege in the complaint four transactions here that your client thought were inappropriate . . . . So you're telling me that the most egregious conduct, the third rail, to use your words, is the reversed accounting reserves. That everybody knows you cannot do that. So since that's your strongest claim, I want to look and see whether or not you've pled enough here to allege that Mr. Berman reasonably believed there was a violation of the covered laws. [JA0133]

In short, the "admissions" supposedly made at oral argument by Berman's counsel are nothing of the kind.

Appellees create their own "red herring" by ticking off things that Berman supposedly should have done if he reasonably believed the law was being violated while he was employed by Neo. [Appellees Br. at 39-41]. However, none of the steps that Appellees argue should have been taken are actually required by either SOX or Dodd Frank as prerequisites to whistle-blower protection. Berman's Complaint alleges the facts needed to invoke the relevant sections of SOX and, in turn, the relevant sections of Dodd Frank – namely, he alleges that he made reports of improper conduct that he reasonably believed to be in violation of federal laws concerning fraud against shareholders to supervisory authorities within his company. [JA0025, JA0027]

Finally, even if the Court finds some pleading defect in Berman's Complaint, dismissal with prejudice is not the appropriate remedy. "The Federal Rules reject

the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Edelman v. Belco Title & Escrow, LLC*, 754 F.3d 389, 395 (7th Cir. 2014), quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). Thus, if a plaintiff has at least colorable grounds for relief, "***justice does ... require leave to amend***." *S.S. Silberblatt, Inc. v. E. Harlem Pilot Block--Bldg. 1 Hous. Dev. Fund Co.*, 608 F.2d 28, 42 (2d Cir. 1979) (emphasis added); *see also Cruz v. TD Bank, N.A.*, 742 F.3d 520, 523 (2d Cir. 2013); *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990). The Court should follow that practice here.[2] To the extent that the Court finds the Complaint somehow insufficient, Berman should be permitted to amend his Complaint to put more "meat on its bones."

[2] Although Berman did not file a formal motion seeking leave to amend his Complaint, "where a plaintiff clearly has expressed a desire to amend, a lack of a formal motion is not a sufficient ground for a district court to dismiss without leave to amend." *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F. 3d 274, 276 (2d Cir. 2006). Berman clearly indicated a willingness to amend if necessary, [JA00135], and Magistrate Judge Netburn in fact granted such leave. [JA0144]

CONCLUSION

For the foregoing reasons as well as the reasons set forth in his initial Brief, Appellant Daniel Berman respectfully requests that the Court reverse the District Court's decision dismissing his claims, find that he is a protected whistleblower under Dodd Frank, and remand the matter for further proceedings.

Respectfully submitted,

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Dated: March 23, 2015

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Attorney for Appellant Daniel Berman

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