No. 14-8015

In the United States Court of Appeals

for the

Eighth Circuit

JULIE A. BUSSING,

Plaintiff-Respondent,

– v. –

COR CLEARING, LLC f/k/a Legent Clearing, LLC; COR SECURITIES HOLDINGS, INC.; STEVEN SUGARMAN; CARLOS P. SALAS; CHRISTOPHER L. FRANKEL and JEFF N. SIME,

Defendants-Petitioners.

INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, THE HONORABLE JOHN M. GERRARD

MOTION FOR LEAVE OF *AMICUS CURIAE* CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS' PETITION FOR PERMISSION TO APPEAL

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Counsel for Amicus Curiae
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DATED: AUGUST 4, 2014

Pursuant to Federal Rules of Appellate Procedure 27 and 29(b), the Chamber of Commerce of the United States ("Chamber") respectfully requests the Court's permission to submit the accompanying Petition of *Amicus Curiae* Chamber of Commerce in Support of Petitioners' Petition for Permission to Appeal. The proposed petition accompanies this motion (Attachment A).

This motion and petition are timely filed within seven days "after the principal brief of the party being supported [was] filed," in accordance with Federal Rule of Appellate Procedure 29(e). Counsel for Defendants-Petitioners consent, but counsel for Plaintiff-Respondent does not. (*See* Declaration of Steven J. Pearlman).

The Chamber has a significant interest in the interpretation and enforcement of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") and the Sarbanes-Oxley Act of 2002. The Chamber is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is representing its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates as *amicus curiae* in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members are employers subject to the whistleblower provisions of Dodd-Frank. The Chamber's members have a strong interest in the fair and efficient enforcement of these provisions in a manner that complies with the textual limitations of Dodd-Frank. To apprise the Court of the business community's interest in this case, the Chamber submits this petition in support of COR's petition for interlocutory review of the District Court's Order denying COR's motion to dismiss.

The Chamber has frequently participated as *amicus curiae* in this Court. *See, e.g.*, *In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917 (8th Cir. 2013); *E.E.O.C. v. CRST Van Expedited, Inc.*, 670 F.3d 897 (8th Cir. 2012); *Brady v. National Football League*, 644 F.3d 661 (8th Cir. 2011); *E.E.O.C. v. Allstate Ins. Co.*, 528 F.3d 1042 (8th Cir. 2008). The Chamber respectfully requests that the Court allow it to offer similar assistance in the present matter, concerning the importance of the issues presented by this interlocutory appeal and the need for appellate review.

WHEREFORE, the Chamber respectfully requests that this Court grant its motion and permit the filing of the accompanying *amicus curiae* petition.

Respectfully submitted this 4th day of August 2014.

U.S. CHAMBER OF COMMERCE

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JULIE A. BUSSING,	:	
Plaintiff – Respondent,	:	No. 14-8015
	:	ECF CASE
- against -	:	
COR SECURITIES HOLDINGS, INC.; CARLOS SALAS; CHRISTOPHER L. FRANKEL; JEFFREY SIME; STEVEN A. SUGARMAN; COR CLEARING, LLC, FORMERLY KNOWN AS LEGENT CLEARING, LLC,	:	**DECLARATION IN SUPPORT**
Defendants- Petitioners.	:	

DECLARATION OF STEVEN J. PEARLMAN

I, **STEVEN J. PEARLMAN**, do hereby declare as follows:

1. I am a partner at Proskauer Rose LLP, a member of the bar of this Court, and counsel for the Chamber of Commerce of the United States of America (the "Chamber") in the above-captioned matter.

2. Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber moves for leave to file the attached proposed petition as *amicus curiae* in support

of Defendants-Petitioners COR Legent Clearing, LLC *et al*. I submit this declaration in support of the Chamber's motion.

3. On August 4, 2014, our firm contacted Plaintiff-Respondent, by phone and email through her attorneys, to request consent to the Chamber's *amicus curiae* petition in the above-referenced matter. Plaintiff-Respondent responded, via email through her attorneys, stating that she does not consent to the filing.

4. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated this 4th day of August, 2014

/s/ Steven J. Pearlman
Steven J. Pearlman

CERTIFICATE OF FILING AND SERVICE

I, Maryna Sapyelkina, hereby certify pursuant to Fed. R. App. P. 25(d) that, on August 4, 2014 the foregoing Motion of Amicus Curiae Chamber of Commerce for Leave to file a Petition Supporting Petitioners' Petition for Permission to Appeal was filed through the CM/ECF system and served electronically on the individual listed below:

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/s/ Maryna Sapyelkina
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Attachment A

No. 14-8015

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– v. –

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Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

DATED: AUGUST 4, 2014

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eighth Circuit Local Rule 26.1A, the Chamber of Commerce of the United States of America, a non-profit tax exempt organization incorporated in the District of Columbia, certifies that it has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members are employers subject to the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). The Chamber's members have a strong interest in the fair and efficient enforcement of these provisions in a manner that complies with the textual limitations of Dodd-Frank. To apprise the Court of the business community's interest in this case, *amicus curiae* submits this brief in support of COR Clearing, LLC, *et al*.'s (collectively, "COR") petition for interlocutory review of the District Court's Order denying COR's motion to dismiss.[1]

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[1] Pursuant to Fed. R. App. P. 29, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, and no person other than the *amicus*, its counsel, and its members contributed money intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

Dodd-Frank expressly defines the word "whistleblower" to mean any individual who "provides . . . information relating to a violation of the securities laws *to the [Securities and Exchange] Commission* [(SEC)]," 15 U.S.C. § 78u-6(a)(6) (emphasis added), from retaliatory conduct by their employers, *id.* § 78u-6(h). The District Court, however, failed to apply this statutory definition, concluding instead that although Ms. Bussing did not provide any information to the SEC, she is nonetheless protected by Dodd-Frank because she is a "whistleblower" in ordinary parlance. This decision rewrites Dodd-Frank, significantly expanding the reach of its whistleblower provisions. As further explained below, the breadth of the District Court's decision and the uncertainty it fosters about the meaning of otherwise clear provisions of Dodd-Frank adversely affects the business community both within this Circuit and nationwide. *Amicus* respectfully submits that this Court should grant the petition for interlocutory review.

ARGUMENT

I. THIS CASE INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCES OF OPINION.

This case presents an issue of first impression in this Court: whether an individual, such as Ms. Bussing, who does not satisfy the express statutory

definition of a "whistleblower" under Dodd-Frank, 15 U.S.C. § 78u-6(a)(6), may nevertheless seek relief under the statute's whistleblower provisions, *id.* § 78u-6(h). The District Court held that although Ms. Bussing did not provide information of a potential violation of securities law to the SEC, she qualified as a whistleblower under the statute.

As evidenced by the parties' briefing on COR's motion to dismiss, the District Court's Memorandum and Order denying COR's motion to dismiss, and the District Court's Order certifying the issues for interlocutory appeal, this is an issue of great importance to employers and employees alike. *See Bussing v. COR Clearing, LLC*, No. 12-cv-238, 2014 WL 2111207, *5-10 (D. Neb. May 21, 2014) ("Op."); *Bussing v. COR Clearing, LLC*, No. 12-cv-238, 2014 WL 3548278, *2 (D. Neb. July 17, 2014) ("Order").

Among the courts that have addressed the issue, there has been substantial disagreement. *See* Order, 2014 WL 3548278, at *2 (acknowledging that this issue has "prompted conflicting rulings from federal courts across the country"); *compare Egan v. TradingScreen, Inc.*, No. 10-cv-8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, No. 11-cv-1424, 2012 WL 4444820 (D. Conn. Sept. 25, 2012) (each extending whistleblower status to an employee who did not provide information to SEC), *with Asadi v. G.E. Energy*

(USA), LLC, No. 12-cv-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), *aff'd* 720 F.3d 620 (5th Cir. 2013); *Englehart v. Career Educ. Corp.*, No. 14-cv-444, 2014 WL 2619501 (M.D. Fla. May 12, 2014); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643 (D. Colo. Jul. 19, 2013), *aff'd on other grounds*, —Fed. App'x—, No. 13-cv-1347, 2014 WL 3377648 (10th Cir. Jul. 11, 2014); *Banko v. Apple, Inc.*, —F. Supp. 2d—, No. 13-cv-2977, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013) (each declining to extend whistleblower status to an employee who did not provide information to SEC).

The District Court's decision in this case is squarely at odds with the Fifth Circuit's recent decision in *Asadi*—the only circuit court decision to address this issue to date. In *Asadi*, an employee made an internal report regarding a potential violation of securities laws, but did not report the potential violation to the SEC. *Asadi*, 720 F. 3d at 621. The employee was later discharged and filed a complaint in district court, alleging a violation of Dodd-Frank's anti-retaliation provision. *Id*. The district court dismissed the complaint on the ground that the employee was not a covered "whistleblower" under the statute because the express statutory definition of that term applies only to a person who makes a report to the SEC, and the employee did not report the information to the SEC. *Id*. at 623.

The Fifth Circuit affirmed, applying several core principles of statutory interpretation to conclude that a "whistleblower" under Dodd-Frank's anti-

retaliation provision covers only a person who reports information to the SEC: (1) who qualifies as a "whistleblower" is governed by the explicit definition provided in the statute; (2) the statute is not ambiguous because the whistleblower provisions can be interpreted harmoniously without rendering any word, phrase or provision moot; and (3) because the plain language of the statute is clear, the SEC's interpreting regulation, which would moot portions of the statute as well as the more general whistleblower scheme under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), is not entitled to deference. *Id*. at 623-628.

The District Court's decision here rejects the holding and reasoning of *Asadi* (Op., 2014 WL 2111207, at *10-13), placing it in direct conflict with the only court of appeals decision to address the issue and providing a sound basis for immediate review by this Court.

II. IMMEDIATE RESOLUTION OF THIS ISSUE IS CRITICAL.

Whether an employee must report a potential violation of securities law to the SEC to be covered by Dodd-Frank's whistleblower provisions is of critical immediate importance to the business community not only in this Circuit, but also nationwide.

Dodd-Frank encourages whistleblowers to provide information related to potential securities violations to the SEC without fear of retribution by: (1) authorizing the SEC to award a monetary bounty to a "whistleblower" who

provides original information to the SEC that leads to a successful enforcement action, 15 U.S.C. § 78u-6(b)(1); and (2) creating a private cause of action for a "whistleblower" who suffers actionable retaliation, *id.* § 78u-6(h)(1)(A)-(B). The application of both the bounty and anti-retaliation provisions turns upon the single, express statutory definition of "whistleblower" in 15 U.S.C. § 78u-6(a)(6).

The District Court's decision undermines the unity of this integrated enforcement scheme. Notwithstanding the single definition of the word "whistleblower" meant to govern throughout 15 U.S.C. § 78u-6, the court has bifurcated the bounty and anti-retaliation provisions, thus enabling individuals who provide no information to the SEC to further its enforcement of the securities laws to take advantage of the anti-retaliation provisions. Its attempt to divorce these provisions is entirely inconsistent with the regulatory scheme: Congress enacted these hand-in-glove provisions in the same section, reflecting its intent to encourage individuals to seek out bounties by providing tips to the SEC unencumbered by any fear of retaliation for doing so.

The District Court's decision also increases litigation costs for employers in this Circuit by exposing them to a dramatically larger group of plaintiffs under Dodd-Frank's whistleblower provisions. In the same vein, the plaintiffs' bar can now take greater advantage of Dodd-Frank's anti-retaliation provisions excusing a plaintiff from exhausting any administrative remedies, 15 U.S.C. § 78u-

6(h)(1)(B)(i), expanding the statute of limitations for bringing a claim to six years from the date of the retaliatory act (or three years from its discovery), *id.* § 78u-6(h)(1)(B)(iii)—a significant increase from the 180-day period under SOX—and providing for the award of double back pay, *id.* § 78u-6(h)(1)(C)(ii). The court's decision would engender the anomalous result of allowing employees to bring SOX whistleblower claims under Dodd-Frank's more generous back pay and statute of limitations provisions, effectively nullifying the whistleblower protection provision in SOX.

Moreover, because the District Court's decision is diametrically opposed to the *only* court of appeals decision to address the issue (*Asadi*), the court's decision creates uncertainty for both businesses and employees nationwide about the scope of Dodd-Frank's whistleblower provisions. Invoking the District Court's interpretation of the statute, the plaintiffs' bar is likely to use any tip to any agency—and perhaps even beyond, such as a complaint to an outside investigator engaged by a company's board of directors who in turn relays the complaint to an agency—about a potential securities-related violation as the basis for a cause of action under Dodd-Frank (Op. at *8). As such, employers are potentially subject to a broader range of claims that Congress never intended Dodd-Frank to cover. That increased litigation risk will loom over the relationship of employers and employees.

CONCLUSION

For the foregoing reasons and the reasons stated in COR's petition, the petition for interlocutory review should be granted.

Respectfully submitted this 4th day of August 2014.

U.S. CHAMBER OF COMMERCE

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Counsel for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE AND VIRUS SCANNING

1. This petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this petition contains 1599 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionality spaced typeface in Microsoft Word for Windows XP in Times New Roman 14 pt. type.

3. The digital version of this petition submitted to the Court pursuant to Eighth Circuit Local Rule 28A(d) was scanned for viruses as it was being copied to a CD-ROM and the CD-ROM is free from viruses.

/s/ Steven J. Pearlman
Steven J. Pearlman
Counsel for Amicus Curiae

Dated: August 4, 2014

CERTIFICATE OF FILING AND SERVICE

I, Maryna Sapyelkina, hereby certify pursuant to Fed. R. App. P. 25(d) that, on August 4, 2014 the foregoing Petition of Amicus Curiae Chamber of Commerce in Support of Petitioners' Petition for Permission to Appeal was filed through the CM/ECF system and served electronically on the individual listed below:

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