

14-4626

**In the United States Court of Appeals
for the Second Circuit**

DANIEL BERMAN,

Plaintiff-Appellant,

-v.-

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

**MOTION OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES**

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RULE 26.1 DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 29(b) and Local Rule 29.1, the Chamber of Commerce of the United States of America (the “Chamber”) respectfully moves this Court for leave to file a brief as *amicus curiae* in support of defendants-appellees Neo@Ogilvy LLC and WPP Group USA, Inc. (“defendants-appellees”). The proposed brief accompanies this motion. Defendants-appellees consent to the filing of this brief; plaintiff-appellant does not consent.

The Chamber is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, 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 vital concern to the Nation’s business community.

The Chamber’s members have a strong interest in the application of the “whistleblower” provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank” or the “Act”) in accordance with the terms of the statute and the purposes of the Act, and in the speedy dismissal of whistleblower retaliation claims that fall outside the Act’s scope. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and

survival of businesses nationwide. In this case, the interpretation of the Dodd-Frank Act espoused by plaintiff and *amicus curiae* Securities and Exchange Commission (“SEC” or the “Commission”) would greatly expand the number of employees authorized to pursue the enhanced remedies of the Dodd-Frank Act, and the period of time in which they may sue for alleged retaliation, without yielding the law enforcement benefits Congress intended when it enacted a “bounty” and heightened protections for persons who complain to the SEC. The carefully-delineated procedures established just a few years earlier in the Sarbanes-Oxley Act would become largely moot under plaintiff’s interpretation, depriving Chamber members of the limitations and protections furnished under that earlier law.

This case presents an issue of first impression in this Circuit, and one with profound ramifications for employers across the country: Whether an individual who does not meet the definition of “whistleblower” in the Dodd-Frank Act can bring a cause of action under the Act’s anti-retaliation provisions. The language of Dodd-Frank is clear that only a “whistleblower”—defined in the statute as an individual who provides information “to the Commission”—is protected by the anti-retaliation provisions of the Act. 15 U.S.C. § 78u-6(a)(6), (h)(1)(A). The district court properly dismissed the Dodd-Frank whistleblower retaliation claim in this case, because at the time plaintiff’s employment was terminated he had not

made a complaint to the SEC and therefore was not a “whistleblower” within the meaning of the Act. Reversal of the district court decision would affect the Chamber’s many members who must defend themselves against Dodd-Frank whistleblower claims.

In this appeal, plaintiff and the SEC urge this Court to adopt an interpretation that expands the meaning of “whistleblower” as used in the anti-retaliation provision beyond the statute’s definition of the term. The Chamber’s proposed *amicus* brief addresses the proper interpretation of the relevant statutory provisions, and the legal error and adverse practical consequences of plaintiff’s and the SEC’s interpretation. That interpretation is inconsistent with the primary purpose of the Dodd-Frank whistleblower provisions—to alert the Commission about potential securities law violations—and would undercut the anti-retaliation provisions and procedures of the Sarbanes-Oxley Act of 2002. It would also create a circuit split with the Fifth Circuit, which is the only court of appeals to decide this question to date, and would open the door to countless lawsuits that were not contemplated by the whistleblower framework established by Congress in Dodd-Frank and Sarbanes-Oxley.

Amicus curiae briefs of the Chamber have regularly been accepted by the federal courts of appeals and the United States Supreme Court, including in cases concerning the Dodd-Frank Act and the Sarbanes-Oxley Act. *See, e.g., Lawson v.*

FMR LLC, 134 S. Ct. 1158 (2014); Mot. Order, *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, No. 14-457 (2d Cir. Mar. 13, 2015); *Villanueva v. U.S. Dept. of Labor*, 743 F.3d 103 (5th Cir. 2014); Mot. Order, *In re Am. Express Merchants' Litig. (III)*, No. 06-1871 (2d Cir. Mar. 6, 2012). Indeed, this Court has previously acknowledged the Chamber's helpful assistance as *amicus curiae*. See *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 27 (2d Cir. 2001) (noting that the Court "received five helpful *amicus* briefs," one of which was filed by the Chamber); *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497, 515 (2d Cir. 2014) (citing the Chamber's *amicus* brief). The Chamber respectfully submits that its proposed brief would be an appropriate counter-weight to the *amicus* brief submitted by the SEC in this case.

For all these reasons, the Chamber requests that this Court grant its motion and permit the filing of the accompanying *amicus curiae* brief in support of defendants-appellees.

Dated: March 16, 2015

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 16th day of March 2015, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

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