

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

<p>ARSHAD AZIM</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>TORTOISE CAPITAL ADVISORS, LLC et al.</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 13-cv-2267-DDC/JPO</p> <p><b>MOTION AND INCORPORATED MEMORANDUM OF LAW BY THE SECURITIES AND EXCHANGE COMMISSION (1) FOR WAIVER OF THE <i>PRO HAC VICE</i> REQUIREMENT AND (2) TO FILE <i>AMICUS CURIAE</i> BRIEF IN SUPPORT OF PLAINTIFF</b></p>
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The Securities and Exchange Commission (SEC or Commission), a non-party to this action, respectfully requests a waiver of D. Kan. Rule 83.5.4 and permission to file an *amicus curiae* brief in support of plaintiff Arshad Azim.<sup>1</sup> The brief, a copy of which is attached, addresses an important question concerning the proper interpretation of Section 21F(h)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6. The SEC has consulted with counsel for each party, and neither party opposes this motion.

In their pending motion for summary judgment, the defendants contend that Azim's Section 21F(h)(1) whistleblower employment retaliation claim fails as

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<sup>1</sup> The federal government can file an *amicus* brief without consent of the parties or leave of the court on appeal (Fed. R. App. Proc. 29(a)). There is no corresponding provision for filing as *amicus* in the district court, but this Court has previously permitted *amicus* participation by non-parties where appropriate. *See, e.g., Quik Payday, Inc. v. Stork*, 509 F.Supp.2d 974, at 982 and n.6 (D. Kansas 2007) (referencing arguments made by *amicus* Online Lenders Alliance); *Raytheon Aircraft Co. v. U.S.*, 501 F.Supp.2d 1323, at n.1 (D. Kansas 2007) (court considered and separately addressed arguments presented by The Washington Legal Foundation and Kansas Grain and Feed Association as *amici*).

a matter of law because, in their view, the provision protects *only* individuals who have reported a potential securities law violation directly to the Commission prior to the alleged retaliation. DE 122 at pp. 1-2, 34-36.<sup>2</sup> As explained below, the Commission, through notice-and-comment rulemaking, has adopted a broader reading of the scope of Section 21F(h)(1)'s protections.

The SEC is requesting that the *pro hac vice* rule be waived because this is the only filing it expects to make in this action. The SEC does not have an office in Kansas; no one in the office that is making this filing is admitted to practice in Kansas; and there is not an expedient way to find out if someone employed by the agency happens to be admitted in Kansas. In addition, while there are no district court rules specifying when an *amicus* filing is due, our typical practice is to file on the same day as the party whose position we are supporting files whenever possible—in this case, today. I have attached a sworn Affidavit in the form prescribed by D. Kan. Rule 83.5.4 in support of this request.

## **I. BACKGROUND**

Section 21F, which was added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), provides a number of measures to encourage individuals to step forward to disclose potential securities law violations. In particular, Section 21F authorizes the Commission to

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<sup>2</sup> The Commission does not take a position on any other issues that may be presented in the defendants' motion for summary judgment or in this action. The motion to file as *amicus* is limited to the issue of whether an employee is required to make a report to the Commission prior to the alleged retaliation in order to pursue a claim under Section 21F(h)(1) and the regulations thereunder.

pay monetary awards to individuals who voluntarily provide information that leads to a successful enforcement action, and prohibits employers from retaliating against individuals in the terms and conditions of their employment when the individuals engage in certain specified whistleblowing activities (collectively referred to as the “whistleblower program”).

When the Commission issued its rules under Section 21F to implement the whistleblower program, it included a rule clarifying that the employment retaliation protections apply whenever an employee engages in any of the whistleblowing activities specified in Section 21F(h)(1) — including making a report of a potential securities law violation to a supervisor or compliance official at a public company — *irrespective of whether the employee separately reports the information directly to the Commission*. See 17 C.F.R. § 240.21F-2(b)(1). The Commission issued the clarifying rule to address a statutory ambiguity that exists as a result of considerable tension within the text of Section 21F.

Since the Commission issued its rule, a majority of the federal courts that have considered the interpretive issue have agreed with the Commission that the statutory language is ambiguous, and have deferred to the Commission’s interpretation.<sup>3</sup>

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<sup>3</sup> See, e.g., *Somers v. Digital Realty Trust, Inc.*, 2015 WL 2354807 (N.D. Cal. May 15, 2015); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 993-95 (M.D. Tenn. 2012); *Bussing v. COR Clearing, LLC*, 20 F.Supp.3d 719, 728-35 (D. Neb. 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F.Supp.2d 141, 146-48 (S.D.N.Y. Oct. 25, 2013); *Ellington v. Giacomakis*, 977 F.Supp.2d 42, 44-46 (D. Mass. 2013); *Genberg v. Porter*, 935 F.Supp.2d 1094, 1106-07 (D. Colo. 2013), *appeal dismissed in relevant part*, 566 Fed. App’x

## II. ARGUMENT

The Commission has a strong programmatic interest in demonstrating that its reasonable interpretation of Section 21F(h)'s ambiguous statutory language was a valid exercise of its broad rulemaking authority. This interest arises for two related reasons. *First*, the rule helps protect individuals who choose to report potential violations internally in the first instance (*i.e.*, before reporting to the Commission), and thus is an important component of the overall design of the Commission's whistleblower program. *Second*, if the rule were invalidated, the Commission's authority to pursue enforcement actions against employers that retaliate against individuals who report internally would be substantially weakened.

The Commission respectfully submits that, as the primary federal securities regulator and the agency charged with administering the Congressionally-mandated whistleblower program, its explanation of the regulatory background and its analysis of the statutory text will aid the Court in ruling on the defendants' Motion to Dismiss. Among other things, the brief thoroughly explains: (i) the importance of internal reporting as a means for deterring, detecting, and stopping unlawful conduct that may harm investors; (ii) the context and purposes for which

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719 (10th Cir. 2014); *Yang v. Navigators Group, Inc.*, 18 F.Supp.3d 519, 531-34 (S.D.N.Y. 2014); *Kramer v. Trans-Lux Corp.*, 2012 WL 4444820, at \*3-5 (D. Conn. Sept. 25, 2012); *Connolly v. Remkes*, 2014 WL 5473144, at \*4-6 (N.D. Cal. Oct. 28, 2014); *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at \*3-6 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3<sup>rd</sup> Cir. 2014); *Murray v. UBS Sec., LLC*, 2013 WL 2190084, at \*2-7 (S.D.N.Y. May 21, 2013); *Egan v. TradingScreen, Inc.*, 2011 WL 1672066, at \*3-5 (S.D.N.Y. May 4, 2011).

Section 21F was enacted; and (iii) the Commission's reasonable exercise of its authority to issue rules and regulations implementing Section 21F(h) to resolve a statutory ambiguity inherent in that section.

### **III. REQUEST TO WAIVE FEDERAL AND LOCAL RULES OF CIVIL PROCEDURE REGARDING FORMAT AND LENGTH OF FILINGS**

The *amicus* brief the Commission proposes to file was initially filed with the Second Circuit in *Berman v. Neo@Ogilvy LLC*, Case No. 14-4626, and conforms to that court's length, spacing, typeface, and other rules.<sup>4</sup> The SEC intends to make the identical legal arguments here as were made in the attached brief. Therefore, to the extent the brief does not conform to this Court's requirements, the SEC respectfully requests that the Court exercise its authority to waive these requirements and permit the brief to be filed in the identical format as attached to this motion. The SEC also asks that, if the Court does not grant this request, it be granted leave to revise the brief to conform to this Court's rules.

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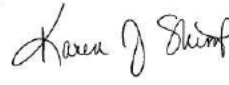
<sup>4</sup> The Commission was given permission to file a brief that exceeded the standard length of an appellate *amicus* brief. As filed, the brief has 8,660 words excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

**IV. CONCLUSION**

For the foregoing reasons, the SEC respectfully requests that the Court: (1) waive D. Kan. Rule 83.5.4; (2) permit the Commission to file an *amicus curiae* brief in support of the plaintiff; (3) waive the rules regarding format and length of filings; and (4) accept the attached brief for filing.

May 26, 2015

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Assistant General Counsel  
DC Bar # 426340

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*Counsel for Movant SEC*

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I declare that the following facts are true, to the best of my knowledge, information and belief:

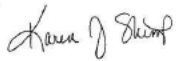
1. My full name is: Karen Johnson Shimp
2. I practice under the following firm name or letterhead:  
Name: U.S. Securities and Exchange Commission  
Address: 100 F Street N.E.  
Washington, D.C. 20549-9612  
Telephone Number: XXXXXXXXXX  
Email address: shimpk@sec.gov
3. I have been admitted to practice in the following courts (here list the dates and places of admission to all bars, state or federal, and any bar registration numbers):

<u>Court</u>	<u>Date of Admission</u>	<u>Bar Number</u>
District of Columbia	November 7, 1997	456265
Maryland	December 19, 1996	199612190150
***Following in capacity as federal attorney only***		
Court of Appeals for the 4 <sup>th</sup> Circuit	May 12, 2004	
Court of Appeals for the 5 <sup>th</sup> Circuit	December 7, 2001 (renewed August 26, 2008)	
Court of Appeals for the 9 <sup>th</sup> Circuit	July 23, 2002	
Court of Appeals for the 2 <sup>nd</sup> Circuit	May 5, 2008	
Court of Appeals for the DC Circuit	July 15, 2013	54925
D. Colorado	January 30, 2002	
E.D. Wisconsin	May 1, 2001	

4. /Not applicable pursuant to request to waive D. Kan. Rule 83.5.4/

5. I consent to the exercise of disciplinary jurisdiction over any alleged misconduct that occurs during the progress of this case.
6. I am in good standing in all bars of which I am a member.
7. No disciplinary or grievance proceedings have been previously filed against me.
8. No disciplinary or grievance proceedings are pending against me in any jurisdiction.
9. I have not been charged in any court of the United States or of any state, territory or possession of the United States with the commission of a felony or unprofessional conduct.
10. I will complete the Electronic Filing Registration Form. I understand I will receive System-generated notices of electronic filing.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.



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Karen J. Shimp, Esq.  
(original signature on file and will be retained)



**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Motion and Incorporated Memorandum of Law by the Securities and Exchange Commission (1) for Waiver of the *Pro Hac Vice* Requirement and (2) to File *Amicus Curiae* Brief in Support of Plaintiff** is being served this same day on each of the parties as follows:

<b>Via email and U.S. mail</b> Arshad Azim 3114 Charlotte Street Kansas City, MO 64109 ArshaddotAzim@yahoo.com <i>Plaintiff pro se</i>	<b>Via CM/ECF</b> Anthony J. Romano Brian J. Zickefoose POLSINELLI P.C. 900 West 48 <sup>th</sup> Place, Suite 900 Kansas City, MO 64112-1895 <i>Counsel for Defendants</i>
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Karen J. Shimp, Esq.

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The Court having considered the Securities and Exchange Commission’s motion to file an *amicus curiae* brief on the sole issue of whether an individual must make a report to the SEC in advance of alleged retaliation to be considered a “whistleblower” within the meaning of the anti-retaliation provisions of 15 U.S.C. § 78u-6, hereby orders that the provisions of D. Kan. Rule 83.5.4 are waived and the motion is GRANTED. The Clerk is directed to file the brief that was attached as an exhibit to the SEC’s motion as a brief *amicus curiae*.

\_\_\_\_\_  
Date

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Hon.