UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN DOE, Plaintiff, -against- OPPENHEIMER ASSET MANAGEMENT, INC., OPPENHEIMER & CO., INC., BRIAN WILLIAMSON and JOHN T. McGUIRE, Defendants.	Case Number: 1:14-cv-00779-HB

THE SECURITIES AND EXCHANGE COMMISSION'S NOTICE OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND INCORPORATED MEMORANDUM OF LAW

The Securities and Exchange Commission respectfully moves this Court for leave to file an amicus curiae brief[1] in support of John Doe on the issue of whether he was required to provide information to the SEC to qualify as a "whistleblower" for purposes of Dodd-Frank's anti-retaliation provision. A copy of the brief has been submitted with this motion. The undersigned conferred with the parties' counsel regarding their positions on this motion. Counsel for Plaintiff and counsel for the

[1] The federal government may 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., Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 447 & n.2 (S.D.N.Y. 2012) (granting motions for leave to file amicus briefs, and noting that "[c]ourts have the discretion to allow amicus briefs"); *United States ex rel. Mergent Serv. v. Flaherty*, 2006 WL 880044, *1 n1. (S.D.N.Y. Apr. 6, 2006) (noting that the United States had filed an amicus brief with the court on a False Claims Act issue).

Oppenheimer companies and McGuire consent to the SEC's filing of this motion. Counsel for Williamson was unable to respond with his client's position before this notice was filed (the undersigned was not able to pose the question to counsel until yesterday).

The SEC's interest in this issue. The defendants in this case argue that John Doe was required, as a matter of law, to make a report to the SEC before he was fired in order to be protected by the whistleblower anti-retaliation provisions of Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010).[2]

In Section 922, Congress amended the Securities Exchange Act of 1934 to add Section 21F, entitled "Securities Whistleblower Incentives and Protection." Among other things, Section 21F prohibits employers from retaliating against individuals in the terms and conditions of their employment when they engage in certain specified whistleblowing activities.

In May 2011, at Congress's direction, the SEC issued final rules "implementing the provisions of Section 21F[.]" *See* Dodd-Frank §924(a). Throughout the rulemaking process, the SEC considered the "significant issue" of how to ensure that its implementation did not undermine the willingness of individuals to make whistleblower reports internally *before* they make reports to the SEC. Securities Whistleblower Incentives and Protections ("Adopting Release"), 76 Fed. Reg. 34300

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[2] *See* Defendants' Joint Memorandum of Law in Support of Motion to Dismiss at 11-13 (filed April 7, 2014).

(June 13, 2011); *see also id.* at 34323 (explaining that an "objective" of the rulemaking was "to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials *first* while still preserving their rights under the Commission's whistleblower program") (emphasis added); Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 ("Proposing Release"), 75 Fed. Reg. 70488 (Nov. 17, 2010) (same). The SEC's final rules were carefully calibrated to achieve this objective by providing "strong incentives" for individuals in appropriate circumstances to report internally in the first instance. Adopting Release at 34301 ("[The final rules] incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate."); *id.* at 34322 (explaining that the SEC's "final rules seek to enhance the incentives for employees to utilize their company's internal reporting systems").[3]

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[3] The SEC recognized that internal reporting is not always appropriate, and the decision whether to do so (either prior to reporting to the SEC or at all) is best left for the whistleblower to determine based on the particular facts and circumstances. *See* Adopting Release at 34327 ("[W]e believe that it is appropriate for us to provide significant financial incentives as part of the whistleblower program to encourage employees and other insiders to report violations internally, while still leaving the ultimate decision whether to report internally to the whistleblower"). Among the considerations a whistleblower would likely consider are: (i) whether the employer has an anonymous reporting system; (ii) whether the potential misconduct involves upper-level management; (iii) whether the misconduct is still ongoing and poses a risk of sufficiently significant harm to investors that immediate reporting to the Commission is more appropriate; and (iv) whether the employer may be prone to bad-faith conduct such as the destruction of evidence. *Id.* at 34326.

One of those rules—Rule 21F-2(b)(1), 17 C.F.R. §240.21F-2(b)(1)—is at issue in this litigation. In promulgating that Rule, the SEC recognized that there is an inherent ambiguity created by the tension between the Dodd-Frank Act's definition of "whistleblower" and other language in the Act's anti-retaliation provision. The SEC resolved that ambiguity by clarifying in Rule 21F-2(b)(1) that an employee does *not* have to make a report to the SEC to claim the protection of Section 21F.

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

The majority of courts that have considered the argument advanced here by defendants have rejected it. The issue is currently before the Second Circuit in *Liu v. Siemens AG*, No. 13-4385.[4] But some courts (most notably the Fifth Circuit) have accepted the argument advanced by Defendants.

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[4] The SEC does not take a position on any other issues that may be presented in defendants' motion to dismiss or in this action. Our motion to file as amicus is limited to the issue of whether an employee is required to make a report to the SEC

The proposed amicus brief will assist the Court. The brief that the SEC is asking the Court to consider as amicus addresses this important issue and will aid the Court in considering the parties' arguments. While the main points are summarized above, 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 Section 922 was enacted; and (iii) the SEC's reasonable exercise of its authority to issue rules and regulations implementing Section 922 to resolve a statutory ambiguity inherent in that section. The SEC respectfully submits that, as the primary federal securities regulator and the agency charged with administering the Congressionally-mandated whistleblower program, its analysis and explanation of the development of Rule 21F-2(b)(1) will aid the Court in ruling on defendants' Joint Motion to Dismiss.

Request to waive Federal and Local Rules of Civil Procedure regarding format and length of filings. The amicus brief the SEC proposes to file was initially filed with the Second Circuit in *Liu v. Siemens AG*, No. 13-4385, and conforms to that court's rules on length, spacing, typeface, and other matters. 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

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in order to claim the anti-retaliation protections of Section 21F and the regulations thereunder.

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.

Conclusion. The SEC respectfully requests that the Court grant the Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff; waive the rules regarding format and length of filings; and accept the attached brief for filing.

June 6, 2014

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CERTIFICATE OF SERVICE

I certify that an accurate and complete copy of **The Securities and Exchange Commission's Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff and Incorporated Memorandum of Law** was served on all parties by means of the Court's CM/ECF System as reflected in a Notice of Electronic Filing.

June 6, 2014

/s/ Karen J. Shimp
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Karen J. Shimp