

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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EVA WIGGINS,

Plaintiff,

v.

Case No. 14-CV-1089-JCH

ING U.S., INC. AND ING LIFE  
INSURANCE AND ANNUITY  
COMPANY,

Defendants.

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**MOTION AND INCORPORATED MEMORANDUM OF LAW  
BY THE SECURITIES AND EXCHANGE COMMISSION  
TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF**

The Securities and Exchange Commission (SEC or Commission), a non-party to this action, respectfully requests permission to file an *amicus curiae* brief in support of plaintiff Eva Wiggins.<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 the parties do not oppose this motion.

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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 *District Lodge of Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Technologies Corp.*, 2009 WL 3571624, at \*1 (D. Conn. Oct. 23, 2009) (noting that “[d]istrict courts have broad discretion to grant or deny permission to participate as *amicus curiae*” and granting Connecticut’s motion for leave to participate as *amicus*); *U.S. ex rel. Capella v. Norden Systems, Inc.*, 2000 WL 1336487, at \*3 n. 4 (D. Conn. Aug. 24, 2000) (noting that the United States was granted leave to file a brief as *amicus curiae*).

In their pending motion to dismiss, the defendants contend that Wiggins' Section 21F(h)(1) whistleblower employment retaliation claim fails as 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.<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.

**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 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 they 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.

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<sup>2</sup> See Memorandum of Law in Support of Defendants' Motion to Dismiss, Docket Entry 14-1 (filed November 18, 2014), at 11-12 ("Motion to Dismiss").

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. *See, e.g., Kramer v. Trans-Lux Corp.*, No. 11 Civ. 1424, 2012 WL 4444820, at \*3-5 (D. Conn. Sept. 25, 2012); *Connolly v. Remkes*, No. 5:14-cv-01344, 2014 WL 5473144, at \*4-6 (N.D. Cal. Oct. 28, 2014); *Peters v. LifeLock Inc.*, No. 2:14-cv-00576, Dkt. 47, slip op. 6-13 (D. Ariz. Sept. 19, 2014); *Yang v. Navigators Group, Inc.*, No. 13-cv-2073, 2014 WL 1870802, at \*10-13 (S.D.N.Y. May 8, 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 WL 940703, at \*3-6 (D.N.J. Mar. 11, 2014), *appeal pending on other grounds*, No. 14-1689 (3d Cir.); *Ellington v. Giacoumakis*, 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 719 (10th Cir. 2014); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-95 (M.D. Tenn. 2012); *Bussing v. COR Clearing, LLC*, No. 8:12-cv-238, 2014 WL 2111207, at \*5-13 (D. Neb. May 21, 2014); *Azim v. Tortoise Capital Advisors, LLC*, No. 13-2267, 2014 WL 707235, at \*1-3 (D. Kans. Feb. 24, 2014), *objections overruled*, 2014 WL 4352069 (D. Kans. Sept. 2, 2014).

## **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 ING's Motion to Dismiss.<sup>3</sup> 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 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 *Liu v. Siemens AG*, No. 13-4385, and conforms to that court's length, spacing, typeface, and other rules. 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. *See* D. Conn. Local Civil Rule 7(a)(2). 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>3</sup> The Commission does not take a position on any other issues that may be presented in ING's motion to dismiss 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 in order to pursue an employment retaliation claim under Section 21F(h)(1) and the regulations thereunder.

**IV. Conclusion**

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

December 19, 2014

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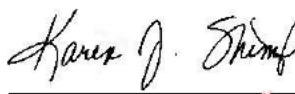
**CERTIFICATE OF SERVICE**

I certify that each of the parties to this action is an electronic filer, and will thus receive a service copy of the foregoing **Motion and Incorporated Memorandum of Law by the Securities and Exchange Commission to File *Amicus Curiae* Brief in Support of Plaintiff** through the Court's CM/ECF system.

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December 19, 2014

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