**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| **DAVID DANON** | **Civil Action No. 15-6864 (CDJ)** |
| **v.** | |
| **THE VANGUARD GROUP, INC.** | **Judge C. Darnell Jones** |

**MOTION OF SECURITIES AND EXCHANGE COMMISSION FOR LEAVETO FILE AMICUS BRIEF.**

The Securities and Exchange Commission ("Commission") moves the Court for an order permitting it to file *amicus curiae* brief in support of plaintiff Danon.[1] The brief, a copy of which is attached, addresses an important question concerning the proper interpretation of Section 21F(h)(1) of 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.*, *Colacicco v. Apotex, Inc.*, 432 F. Supp.2d 514, 519 (E.D. Pa. 2006) (noting that court had requested amicus brief from Food and Drug Administration on implied preemption issues raised by case), *aff'd on other grounds*, 521 F.3d 253 (3d Cir. 2008), *cert. granted and judgment vacated on other grounds*, 556 U.S. 1101 (2009) ; *Liberty Resources, Inc. v. Philadelphia Housing Auth.*, 395 F.Supp.2d 206, 209-10 (E.D. Pa. 2005) (granting advocacy group's motion to participate as amicus where that participation "will ensure a 'complete and plenary presentation of difficult issues' in a case involving important public interests").

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 its motion to dismiss, Vanguard contends that Danon's Section 21F(h)(1) whistleblower employment retaliation claim fails as a matter of law because, in Vanguard's view, the provision protects *only* individuals who have reported a potential securities law violation directly to the SEC prior to the alleged retaliation. See Defendant's Mem. of Law in Supp. of its Mot. to Dismiss the Compl. (Dkt. No. 6-2) at 22-24.[2] As explained below, the Commission, through notice-and-comment rulemaking and an interpretative release, 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

[2] The Commission does not take a position on any other issues that may be presented in the 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 prior to the alleged retaliation in order to pursue a claim under Section 21F(h)(1) and the regulations thereunder.

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 district courts and the Second Circuit Court of Appeals (*Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. Sept. 10, 2015)) have agreed with the Commission that the statutory language is ambiguous, and have deferred to the Commission's interpretation.[3]

---

[3] *See, e.g., Wadler v. Bio-Rad Laboratories, Inc.*, 2015 WL 6438670, *12-17 (N.D. Cal. Oct. 23, 2105); *Somers v. Digital Realty Trust, Inc.*, 2015 WL 2354807, at *3-13 (N.D. Cal. May 15, 2015), *interlocutory appeal certified*, 2015 WL 4481987 (N.D. Cal. July 22, 2015), *and docketed*, No. 15-80136 (9th Cir. July 31, 2015); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 993-95 (M.D.

## 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.

---

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. 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); *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 (3rd 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); *Peters v. Lifelock Inc.*, Case No. 14cv00576 (D. Ariz. Sept. 19, 2014), DE 47, at 6-13.

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 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 Sixth Circuit on February 4, 2016 in *Verble v. Morgan Stanley Smith Barney LLC*, No. 15-6397, and conforms to that court's length, spacing, typeface, and other rules.[4] 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

[4] The Commission was given permission to file a brief that exceeded the standard length of an appellate *amicus* brief. As filed, the brief has 8,745 words excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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.

## IV. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the 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.

March 28, 2016

/s/ Thomas J. Karr
THOMAS J. KARR
Assistant General Counsel
DC Bar # 426340

Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-9612
Tel: [redacted]
karrt@sec.gov

*Counsel for Movant SEC*