# Supreme Court To Consider The Scope Of Dodd-Frank Whistleblower Provisions

On June 26, 2017, the United States Supreme Court granted the petition for certiorari of Digital Realty Trust Inc. ("Digital Realty") to consider whether the anti-retaliation provision for whistleblowers in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission ("SEC") and thus arguably fall outside Dodd-Frank's definition of a "whistleblower."[1] In March, the United States Court of Appeals for the Ninth Circuit ruled, in a 2-1 decision, that the term "whistleblower" extends protection to employees making internal disclosures of alleged unlawful activity, and does not limit protection under Dodd-Frank to employees reporting potential violations to the SEC.[2] The Ninth Circuit's decision widened an existing split between the Second and Fifth Circuits, making the issue ripe for review.

## I. Background

Respondent, Paul Somers, was employed by Petitioner, Digital Realty, from 2010 to 2014. During that time, Somers made reports to senior management alleging federal securities laws violations by Digital Realty. Shortly after he raised these concerns internally, and before he made any report to the SEC, Digital Realty terminated Somers' employment. Following his firing, Somers sued Digital Realty, alleging violations of various state and federal laws, including Section 21F of the Securities Exchange Act of 1934 ("Exchange Act"), which contains anti-retaliation provisions added by Dodd-Frank.

At the district court level, Digital Realty moved to dismiss the retaliation claim on the ground that Somers was not a "whistleblower" entitled to Dodd-Frank's protections because he merely reported possible violations internally and not to the SEC. The district court denied Digital Realty's motion to dismiss holding that individuals who report internally are protected from retaliation under Dodd-Frank.[3] Digital Realty appealed to the Ninth Circuit.

## II. The Ninth Circuit's Decision

The Ninth Circuit panel began its discussion by acknowledging the split between the Second and Fifth Circuits. The Fifth Circuit held in *Asadi* v. *G.E. Energy (USA), L.L.C.* that Dodd-Frank's anti-retaliation provision requires a whistleblower to make a report to the SEC in order to be covered, rejecting the SEC's regulation adopting a contrary interpretation.[4] The Second Circuit held in *Berman* v. *Neo@Ogilvy LLC* that the provision extends protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC.[5]

Next, the court chronicled the contours of a robust twenty-first century financial regulatory framework it described as created specifically to curb securities abuses. To frame the case against this regulatory backdrop, the court focused on provisions of the Sarbanes-Oxley Act ("SOX") including internal reporting requirements for

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[1] *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, No. 16-1276 (U.S. June 26, 2017).

[2] *Id. at 1050.*

[3] *Somers v. Dig. Realty Tr. Inc.*, 119 F. Supp. 3d 1088, 1104-06 (N.D. Cal. 2015).

[4] 720 F.3d 620 (5th Cir. 2013). SEC regulations adopted in 2011 define "whistleblower" more broadly than Dodd-Frank's whistleblower provision by providing that an individual qualifies as a "whistleblower" even though he never reports any information to the SEC. *See* 17 C.F.R. § 240.21F–2(b)(1) (Westlaw 2017).

[5] 801 F.3d 145 (2d Cir. 2015).

lawyers, requirements for anonymous reporting avenues within corporate compliance regimes, and most importantly, whistleblower protections for employees. The court acknowledged SOX's express protections of those who lawfully provide information to federal agencies, Congress, or "a person with supervisory authority over the employee."[6] With respect to Dodd-Frank, the court reasoned that, like SOX, the legislation was passed in the wake of a financial scandal with the primary aims of improving accountability and transparency in the financial system, and protecting consumers from abusive financial practices.[7]

As the court observed, Dodd-Frank created incentives and protections for whistleblowers by adding Section 21F to the Exchange Act. Unlike SOX, however, Section 21F defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]."[8] On its face, this definition describes a whistleblower as a person who reports information directly to the SEC. The issue in *Somers* arises out of a later subsection of Section 21F – specifically subdivision (iii) – wherein whistleblower protection extends to individuals who make any "required or protected" disclosure under SOX and all other relevant laws. Subdivision (iii) was added after the bill went through Committee, so there is no meaningful legislative history on it.

Although legislative history is not helpful, the Ninth Circuit found that the language of subdivision (iii) "illuminates congressional intent."[9] The Ninth Circuit found that, by incorporating SOX's disclosure requirements and protections through subdivision (iii), Congress meant for Dodd-Frank to bar retaliation against an employee of a public company who "provide[s] information . . . to a person with supervisory authority over the employee."[10] Citing a similar analysis from the Second Circuit, the Ninth Circuit drew attention to the "absurdities" potentially created by a different interpretation, explaining that, "if subdivision (iii) requires reporting to the [SEC], its express cross-reference to the provisions of Sarbanes-Oxley would afford an auditor almost no Dodd-Frank protection for retaliation because the auditor must await a company response to internal reporting before reporting to the [SEC], and any retaliation would almost always precede [SEC] reporting."[11] Even though Dodd-Frank's definition of "whistleblowers" is limited to those persons who report to the SEC, the Ninth Circuit posited that terms can have different operative consequences in different contexts, and therefore was comfortable accepting that the term "may mean a different thing in a different part, depending on context." The court stated that interpreting the word "whistleblower" to incorporate the earlier, narrower definition of the Exchange Act would "make little practical sense" and "undercut congressional intent." Citing again to the Second Circuit's similar reasoning in *Berman*, the Ninth Circuit concluded that a strict application of Dodd-Frank's definition "would, in effect, all but read subdivision (iii) out of the statute."[12]

Furthermore, unlike the Fifth Circuit in *Asadi*, the court accorded deference to the SEC rules adopted in 2011 that contain the more expansive definition of "whistleblower" and found that those rules reflected Congressional intent to provide broad whistleblower protection. With those bases, the court held that any employee who takes any action described in subdivisions (i), (ii), or (iii) of the anti-retaliation provision – including, by reference to SOX, reporting "to a person with supervisory authority over the employee" – is entitled to protection as a whistleblower. The Ninth Circuit concluded that the interpretation accurately reflects

[6] 18 U.S.C. § 1514A(a).

[7] *Somers*, 850 F.3d at 1048.

[8] 15 U.S.C. § 78u-6(a)(6).

[9] *Somers*, 850 F.3d at 1049.

[10] *Id.*

[11] *Id.*, *citing Berman*, 801 F.3d at 151.

[12] *Id.* at 1050.

Congressional intent that Dodd-Frank protects employees "whether they blow the whistle internally" or report directly to the SEC.[13]

## III. Digital Realty's Petition to the Supreme Court

On April 25, 2017, Digital Realty filed a petition of certiorari for review of the Ninth Circuit's decision. Digital Realty argued that the Supreme Court should grant the petition because the "case presents a straightforward conflict among the courts of appeals on an important and recurring question involving the interpretation of the Dodd-Frank Act" that "cries out for the Court's review."[14] In his response, Somers argued that the case does not warrant further review because "the circuit conflict is shallow and may ultimately resolve itself."[15] Somers stated that "the SEC did not participate in the Fifth Circuit (but did in the [Second and Ninth Circuits]), so there is no split at all in cases directly involving the agency tasked with enforcing the statute."[16] Additionally, he stated that there "is good reason to believe the Fifth Circuit will reconsider its position, especially if additional circuits continue lining up against it."[17] The Supreme Court granted Digital Realty's petition on June 26, 2017, and will hear the case during the October term. A date for oral argument has not been set.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Kimberly Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; Sara Ortiz at 212.701.3368 or sortiz@cahill.com; or Scott Singer at 212.701.3757 or ssinger@cahill.com.

[13] *Id.* at 1051.

[14] Petition for Writ of Certiorari for Defendant-Appellant at 9-10, *Somers v. Dig. Realty Tr., Inc.*, (No. 16-1276).

[15] Brief for Respondent in Opposition at 2, *Somers* v. *Dig. Realty Tr., Inc*., (No. 16-1276).

[16] *Id*. at 4.

[17] *Id*.