SEC whistleblower retaliation – and the federal securities laws – after *Digital Realty*

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Abstract

Purpose – *The purpose of this paper is to analyze the Supreme Court's recent decision in Digital Realty Trust, Inc v. Somers and its significance for whistleblower retaliation remedies and securities law interpretation generally.*

Design methodology approach – *The authors review the statutory, regulatory and decisional history of the anti-whistleblower retaliation remedies of the Sarbanes–Oxley Act and the Dodd–Frank Act; how they were seen by the US Securities and Exchange Commission (SEC) and most courts to be in conflict, and how they were ultimately harmonized by the Supreme Court in Digital Realty.*

Findings – *In Digital Realty, the Supreme Court ruled against the SEC and the leading Courts of Appeal and established that only one who reports securities law violations to the SEC can sue in federal court under the Dodd–Frank Act; all others are limited to the lesser remedies provided by the Sarbanes–Oxley Act. This simple conclusion raises a number of unresolved questions, which the authors identify and discuss. Also, the Supreme Court unanimously continued the pattern of federal securities laws decisions marked by a close reading of the text and a desire to limit private litigants' access to the federal courts.*

Originality value – *This paper provides valuable information and insights about the legal protections for SEC whistleblowers from experienced securities lawyers and more generally on the principles that appear to guide securities law decisions in the Supreme Court.*

Keywords *Retaliation, Sarbanes–Oxley Act, Whistleblowers, Digital Realty Trust, Inc v. Somers, Dodd–Frank Wall Street Reform and Consumer Protection Act, US Securities and Exchange Commission (SEC)*

Paper type *Technical paper*

The late Supreme Court Justice Antonin Scalia had a lot to say about interpreting statutes, and even co-authored a book on how to do it. In two back-to-back chapters he asserted these two "contextual canons":

> 36 [. . .]. Definition sections [. . .] are to be carefully followed.
>
> [and]
>
> 37 [. . .]. A provision may be either disregarded or judicially corrected [. . .] if failing to do so would result in a disposition that no reasonable person could approve[1].

The strange history of the whistleblower retaliation provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010[2] is largely one of judges choosing between Justice Scalia's canons 36 and 37. In *Digital Realty Trust, Inc. v. Somers*[3], a unanimous Supreme Court finally chose canon 36: Dodd–Frank expressly defines a "whistleblower" to be someone who reports securities law violations to the Securities and Exchange Commission (the "SEC"). Dodd–Frank protects only "whistleblowers" from employer retaliation. As those who do not report to the SEC are not Dodd–Frank "whistleblowers", they are not protected by Dodd–Frank's anti-retaliation remedies.

But this issue reached the Supreme Court only because the SEC and the two Courts of Appeal having the most securities law experience thought canon 37 won. Were they really as wrong as a unanimous Supreme Court rebuke suggests? Correctness, we suggest, has little relevance here. Either canon 36 or canon 37 could have prevailed, and either resolution would have worked in the real world. Yes, the Supreme Court in *Digital Realty* read Dodd–Frank the only way an English speaker *could* read it. But the result is what really matters: Now a simple test – Did one report to the SEC? – will both tell litigants if they have a case under Dodd–Frank and allow a reviewing court to decide swiftly whether to dismiss a case brought under Dodd–Frank. *Digital Realty* is therefore one of a long line of Supreme Court securities law decisions that limit who can sue and that set "bright-line" rules of conduct to guide courts and litigants.

1. The statutory framework

All securities laws seem born of some economic catastrophe.

In the wake of the financial crisis after the collapse of Enron Corporation, Congress enacted the Sarbanes–Oxley Act of 2002[4]. Sarbanes–Oxley protects all manner of whistleblowers against employment retaliation for reporting violations of law. Sarbanes–Oxley's reach is so broad that it led Justice Sotomayer to dissent in a Supreme Court review of the Act, saying:

> As interpreted today, the Sarbanes-Oxley Act authorizes a babysitter to bring a federal case against his employer – a parent who happens to work at the local Walmart (a public company) – if the parent stops employing the babysitter after he expresses concern that the parent's teenage son may have participated in an Internet purchase fraud[5].

Sarbanes–Oxley authorizes reinstatement with back pay, interest, attorneys' fees, and "all relief necessary to make the employee whole", including specifically "special damages" (read, emotional distress and reputational harm)[6]. But while Sarbanes–Oxley's reach may be broad in theory, it has tight remedial mechanisms. An aggrieved whistleblower must file a claim within 180 days with the Department of Labor's Occupational Safety and Health Administration ("OSHA"). He or she may sue in federal court only to appeal an adverse OSHA ruling, or if OSHA permits.

Sarbanes–Oxley also places special burdens on professionals like lawyers and accountants to report possible securities law violations to senior management and/or the board of directors. However, because lawyers and auditors have professional obligations to keep client confidences, they need not report to the SEC unless the company fails to act on the information they provide[7]. Therefore, professionals could never, consistent with their professional obligations, report a violation to the SEC *before* confronting their own client/company.

A decade later, the subprime mortgage crisis led Congress to enact Dodd–Frank. Dodd–Frank's § 6 created the SEC Whistleblower provisions (codified as § 21F of the Securities Exchange Act of 1934). Section 6 primarily provides for the payment of awards to whistleblowers whose information leads to successful SEC enforcement actions[8]. It also protects "whistleblowers" against retaliation with remedies like reinstatement with *double* back-pay, interest and litigation costs (but not special damages). Unlike in Sarbanes–Oxley, Dodd–Frank whistleblowers can avoid OSHA to sue directly in federal court, and they have as long as six years to do so.

Here, then, is the crux of the whole debate: Dodd–Frank defines "whistleblower" as "any individual who provides [. . .] information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission"[9]. (Emphasis added.) But Dodd–Frank's anti-retaliation remedies are also available to a "whistleblower" who, in accordance with Dodd–Frank § 6(h)(1)(A)(iii) (generally referred to

simply as "subdivision (iii)"), suffers retaliation "because of any lawful act done by the whistleblower [...] in making disclosures that are required or protected under" Sarbanes–Oxley and other laws subject to SEC oversight – none of which require a report to the SEC. So, "whistleblowers" seem to be protected for making internal Sarbanes–Oxley reports (not to the SEC), even though, by definition, only those who report to the SEC are "whistleblowers".

Congress also authorized the SEC to promulgate rules "consistent with the purposes of this section."[10] In promulgating its final Rule 21F to implement the whistleblower program, the SEC defined "whistleblower" for both awards and anti-retaliation protections. To be a "whistleblower" entitled to anti-retaliation remedies, Rule 21F(2)(b)(iii) provides that "The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award." As the SEC explained in the final enacting Release, "This [...] reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category [(subdivision (iii))] includes individuals who report to persons or governmental authorities *other than the Commission*."[11]

Almost four years later, the SEC issued an Interpretation to further explain itself. The SEC explained that, in its view, "Section [6(a) of Dodd-Frank] is ambiguous on the issue of the scope of the employment retaliation protections afforded thereunder":

> On the one hand, [subdivision (iii)] includes a broad catchall provision that prohibits an employer from, among other things, retaliating against a whistleblower for "making disclosures that are required or protected under" [Sarbanes-Oxley] "and any other law, rule, or regulation subject to the jurisdiction of the Commission". [...] As the Commission explained in the adopting release that accompanied the whistleblower rules, the reporting covered by this provision includes "report[s] to persons or governmental authorities *other than the Commission*." But on the other hand, the employment retaliation protections afforded to whistleblowers under [Dodd-Frank] could be read as limited to only those individuals who provide the Commission with information; this is because under Section [6(a)(6)] the "term 'whistleblower' means any individual who provides [...] information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." (Emphasis added)[12].

To require a report to the SEC, the argument goes, writes subdivision (iii) out of the statute, and to give full effect to subdivision (iii) requires the definition of "whistleblower" to be expanded to include those who only report internally.

The SEC quite candidly stated what it did to resolve that perceived ambiguity. "[T]he Commission in Rule 21F-2 promulgated two separate definitions of 'whistleblower.'" The first, applicable to whistleblowers seeking an award, "mirrors the statutory definition". But the second, for purposes of the anti-retaliation provisions, "does not require reporting" to the SEC. "Under our interpretation, an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission."[13]

The SEC's Rule and interpretation swayed a majority of lower courts to the view that Dodd–Frank's anti-retaliation provisions did not require reporting to the SEC. Generally, the district courts accepted the SEC's conclusion that Dodd–Frank's whistleblower provisions were ambiguous. When a statute is ambiguous and an administrative agency is given overall jurisdiction to enforce it, courts assume that the agency has authority to resolve the ambiguity. So long as the agency's resolution is reasonable, the courts will defer to it – they will grant the agency so-called "*Chevron* deference"[14]. And so, by and large, the lower courts deferred to the SEC's Rule and Interpretation and held that persons who reported internally could sue for retaliation under Dodd–Frank, even if they did not report to the SEC.

2. The conflicting courts of appeal

The first case to reach a federal appellate court involved Khaled Asadi. G.E. Energy (USA), L.L.C. ("GE Energy") posted Asadi to Jordan as its Iraq Country Executive. Then GE Energy hired a close associate of a senior Iraqi official to help facilitate a joint venture agreement with Iraq. Asadi recognized that this might have violated the Foreign Corrupt Practices Act and reported his concerns internally. GE Energy then gave Asadi a poor performance review, demoted him and ultimately fired him.

When Asadi later sued GE Energy, he conceded that he did not fit the definition of "whistleblower" in Dodd–Frank § 6(a) because he had not reported to the SEC. He had also missed the deadline for filing a Sarbanes–Oxley claim with OSHA. Asadi argued that he was nevertheless protected against retaliation because Dodd–Frank's subdivision (iii) would be rendered moot otherwise.

In *Asadi v. G.E. Energy* USA*, L.L.C.*[15], the Court of Appeals for the Fifth Circuit unanimously affirmed the district court's dismissal of Asadi's complaint[16] because, it held, Asadi was not a "whistleblower" as defined in Dodd–Frank[17]. In doing so, the Fifth Circuit panel acknowledged the several district courts that had concluded that Dodd–Frank's anti-retaliation provisions were "either conflicting or ambiguous"[18]. The court also acknowledged that the SEC's Rule 21F did not require whistleblowers to report to the SEC to be eligible for Dodd–Frank's anti-retaliation remedies. No matter: The court found that Dodd–Frank's definition of "whistleblower" was clear – § 6(a) unambiguously required a "whistleblower" to have reported to the SEC, and the court found no reason to ignore that definition.

Specifically, the court found no reason to defer to the SEC because it did not see Dodd–Frank's subdivision (iii) to be inconsistent with the statutory definition of "whistleblower". Subdivision (iii) is not superfluous: It protects an employee who reports both internally *and* to the SEC, and who is fired before the employer learns of the SEC report[19]. The court also reasoned that interpreting Dodd–Frank to apply to whistleblowers who do not report to the SEC has an even odder consequence: Sarbanes–Oxley's anti-retaliation remedies would be rendered practically moot, because few would use them[20].

Asadi did not settle the issue. The lower federal courts outside the Fifth Circuit remained conflicted but still trended in the direction of the SEC's interpretation. The next Court of Appeals to weigh in was the Second Circuit in *Berman v. Neo@Ogilvey LLC*[21]. Daniel Berman was fired after reporting various accounting frauds to his employer. Like Asadi, Berman did not report to the SEC and missed the OSHA filing deadline. So, Berman sued his employer for retaliating against him in violation of Dodd–Frank.

The Second Circuit agreed with *Asadi* that subdivision (iii) protects a whistleblower who reports internally and, without the employer's knowledge, to the SEC. However, the Court thought that circumstance would be extremely rare. Also, lawyers and auditors, who *must* report internally before reporting to the SEC, would be excluded from Dodd–Frank protection. As a result, "there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope. * * * [T]he question then becomes whether Congress intended to add subdivision (iii) [. . .] only to achieve such a limited result."[22]

To answer that question, the Court turned to the legislative history of Dodd–Frank. Subdivision (iii) was added by the conference committee knitting together the House and Senate versions of the bill that became Dodd–Frank. "When conferees are hastily trying to reconcile House and Senate bills [. . .] it is not at all surprising that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly."[23] Noting the limited effect to which subdivision (iii) would be reduced by adopting the definition as written, the Court thought it "doubtful that the conferees [. . .] would have expected

[subdivision (iii)] to have [such] extremely limited scope [. . .] ."[24] So, the court granted the SEC *Chevron* deference and ruled that Berman did not need to have reported to the SEC to have Dodd–Frank's anti-retaliation remedies[25].

Finally came the Ninth Circuit's turn, in *Somers v. Digital Realty Trust Inc.*,[26] the case that eventually went to the Supreme Court. Paul Somers reported securities law violations to senior managers before he was fired. He too did not report to the SEC and missed the OSHA filing deadline. The Ninth Circuit largely followed the reasoning of the Second Circuit in *Berman*. A narrow reading of "whistleblower" to include only those who report to the SEC would undercut Congress's intent to protect whistleblowers. Subdivision (iii) would then only apply to persons who report both internally and secretly to the SEC, as *Asadi* and *Berman* noted, but that result "would, in effect, all but read subdivision (iii) out of the statute."[27] Likewise, attorneys and auditors, by that reading, could never be eligible for Dodd–Frank relief, further undercutting the congressional intent to protect whistleblowers[28]. In the end, the *Somers* court also deferred to the SEC's interpretation of Dodd–Frank; Somers could sue under Dodd–Frank despite his not having reported to the SEC[29].

3. The Supreme Court decision

That the Second Circuit, in New York, and the Ninth Circuit, in San Francisco, are the country's leading courts on securities matters raised the stakes considerably. Berman settled his case after the Second Circuit decision, but Digital Realty chose to keep fighting. The Supreme Court granted its petition for *certiorari* and heard the case on November 28, 2017.

On the surface, *Digital Realty* is unremarkable. Justice Ginsburg wrote the majority opinion, with unanimous concurrence in the result. All reviewing courts agreed that Dodd–Frank expressly defines "whistleblower" as a person who reports wrongdoing to the SEC. The simple application of that clearly-stated definition, in Justice Ginsburg's words, "resolves the question"[30]. Dodd–Frank's whistleblower retaliation remedies are not available to someone who does not report wrongdoing to the SEC – just as the Fifth Circuit and the dissenting judges in the Second and Ninth Circuits said.

To bolster that conclusion, Justice Ginsburg resorted to a pair of common aids of construction.

First, she noted that another part of Dodd–Frank, Title 10, provided anti-retaliation protection to "covered persons" who reported violations of law subject to the jurisdiction of the Consumer Financial Protection Bureau, even if they did *not* report to the SEC. That the term "covered persons" defines protected persons who do not need to report to the SEC, supports the conclusion that it was no mistake for Congress to intend the separate term "whistleblower" to define persons who do[31].

Second, Justice Ginsburg looked at the legislative history to discern Dodd–Frank's "purpose and design". She noted that the "'core objective' of Dodd-Frank's robust whistleblower program [. . .] is 'to motivate people who know of securities law violations to *tell the SEC*.' [. . .] (emphasis added)."[32] "Dodd-Frank's award program and anti-retaliation provision thus work synchronously to motivate individuals with knowledge of illegal activity to 'tell the SEC.'"[33]

This was a crucial shift in perspective. The courts in *Berman* and *Somers* thought Dodd–Frank's intent was to protect whistleblowers from retaliation. However, Justice Ginsburg saw that the "core objective" was, instead, to motivate those with information to "tell the SEC". It makes all the difference. Asadi, Berman and Somers did not "tell the SEC," and so did not promote Dodd–Frank's "core objective". Denying them access to Dodd–Frank's anti-retaliation remedies is wholly in keeping with Dodd–Frank's "purpose and design".

Under this view of the statute, *Chevron* deference was unwarranted. Surely the textual definition of "whistleblower" is not ambiguous. But also, Dodd–Frank's whistleblower provisions neither are internally inconsistent nor lead to results so absurd as to warrant resort to Justice Scalia's Canon 37. Perhaps, as *Berman* and *Somers* feared, subdivision (iii) *does* only cover that small group who report both internally and secretly to the SEC. The actual size of that group, the court observed, is pure speculation, and given that most whistleblowers report anonymously it could be much larger than assumed. But "even if the number [. . .] is relatively limited, '[i]t is our function to give the statute the effect its language suggests, however modest that may be.'"[34] Likewise, there was no reason to think that Congress intended to extend Dodd–Frank protections to lawyers and auditors who were already extensively covered by Sarbanes–Oxley. And, if the core objective of Dodd–Frank is precisely to motivate reports to the SEC, it is no anomaly that two victims of identical retaliation will enjoy different remedies if one of them reports to the SEC and the other doesn't.

All in all, *Digital Realty* is a tightly reasoned gem of a decision bringing both ideological wings of the court together in a unanimous result. [35] What can we take from it?

4. Whistleblower retaliation after *Digital Realty*

Digital Realty establishes a clear demarcation between the SEC whistleblower regimes of Sarbanes–Oxley and Dodd–Frank. Only those who are retaliated against after having reported misconduct to the SEC may sue in federal court under Dodd–Frank. All whistleblowers may file an administrative claim through OSHA under Sarbanes–Oxley, but it is the only recourse for those who do not report to the SEC. Still, some questions remain.

4.1 Must a form TCR filing precede the retaliation?

The language and logic of *Digital Realty* compels a "Yes" answer. Under the statutory definition, one is not a statutory "whistleblower" until one reports to the SEC in the manner prescribed by the SEC. Rule 21F requires whistleblowers to file a Form TCR. The very filing of a Form TCR makes one a "whistleblower," so naturally it must come first. The Solicitor General argued to the Supreme Court that this would let an employer fire an employee who gave testimony to the SEC [which is protected under subdivision (*ii*)] if that employee had not first filed a Form TCR. The Supreme Court in *Digital Realty* acknowledged as much, but also noted that the SEC could amend Rule 21F to encompass giving testimony as another way of reporting to the SEC. However, until the SEC changes Rule 21F, filing a Form TCR seems a necessity. Our advice to those facing an SEC deposition is to file a Form TCR – even anonymously – before testifying.

4.2 Must the retaliation relate to the subject matter of the form TCR?

Dodd–Frank protects "whistleblowers" against retaliation for:

- "providing information" to the SEC, and
- initiating or assisting the SEC to initiate and prosecute investigations or actions "based upon or related to such information".

So, clearly, someone who suffers retaliation *because* he or she filed a Form TCR or gave testimony about the same subject as a prior-filed Form TCR may sue under Dodd–Frank. And, in the scenario oft-debated in the cases, a whistleblower can sue an employer who retaliates for an internal report about the subject of a Form TCR that the employer did not know was filed.

But subdivision (iii) protects those "whistleblowers" who do "any lawful act" required or protected by Sarbanes–Oxley "and any other law, rule or regulation subject to the

jurisdiction of the [SEC]". Unlike subdivisions (i) and (ii), subdivision (iii) is not limited to "such information" as was reported in a Form TCR. On its face, subdivision (iii) protects against retaliation for any securities-law-related whistleblowing after filing a Form TCR, even if on different subjects. This might not come up very often but must be considered an open question.

4.3 May a whistleblower sue a different retaliating employer from the one against whom the form TCR was filed?

Digital Realty does not answer this interesting question. An employee can easily change jobs after filing a Form TCR against the first employer, be exposed as a whistleblower, and face retaliation from his or her new employer. One can well imagine that the new employer may not want a "troublesome whistleblower" in its employ. However, subdivision (iii) clearly says that "*No employer* may [retaliate] against [. . .] a whistleblower [. . .] because of any lawful act done by the whistleblower [. . .] (iii) in making disclosures that are required or protected under [Sarbanes-Oxley, Dodd-Frank], and any other law, rule or regulation subject to the jurisdiction of the [SEC]." (Emphasis added.) The text does not require the retaliating employer to be same as the target of the protected whistleblowing. Therefore, it is a fair reading of the text of subdivision (iii) that a "whistleblower" engaged in protected conduct with respect to a prior employer is protected against retaliation from a subsequent employer. It is also reasonable in light of Dodd–Frank's purpose to encourage persons with knowledge of securities law violations to "tell the SEC" without fear of career suicide. Career suicide can result from the retaliatory acts of a future employer as easily as from those of the target employer.

4.4 Is a whistleblower, having once filed a form TCR as to the conduct of one employer, protected against retaliation for later filing internal reports of different securities law violations by subsequent employers?

The Solicitor General presented the Supreme Court with this very scenario, and the Court deflected it. "We need not dwell on the situation hypothesized [. . .] for it veers far from the case before us."[36] And yet, it is worth considering whether the logic of No. 4.3 above extends so far as to grant Form TCR filers a lifetime entitlement to Dodd–Frank remedies against retaliation for engaging in *any* of subdivision (iii)'s protected conduct, even without filing subsequent Form TCRs. Once a person acquires the status of "whistleblower" by filing a Form TCR, the protections follow so long as he or she remains a "whistleblower". However, nothing in Dodd–Frank provides how or when the status of "whistleblower" is lost. There is no clear conclusion. The status of "whistleblower" might be lost when, for example, the whistleblower is granted an award for whistleblowing, or denied one because the SEC determines his or her information was not valuable, or even when the SEC declines to prosecute a case on the basis of the information provided. On the other hand, the text of subdivision (iii) also permits the conclusion that once a "whistleblower," always a "whistleblower" – and the Supreme Court did not dismiss that possibility out of hand. It is also not unreasonable to think that Dodd–Frank's "core objective" of motivating whistleblowers is furthered by granting lifetime "whistleblower" status to all who take the initiative to report to the SEC. But it is a strange result.

4.5 Does Dodd–Frank's whistleblower protections apply extraterritorially?

The district court dismissed Asadi's original complaint on this basis, and it was not addressed in any subsequent cases. Under *Digital Realty*, it would not seem to matter. Since a report to the SEC is what makes a "whistleblower," where and how the whistleblower reports internally has become irrelevant. A Form TCR may be made from

anywhere in the world. In fact, whistleblower awards have been made to non-USA persons who reported violations of the Foreign Corrupt Practices Act by USA companies overseas[37].

4.6 Are attorneys and auditors really foreclosed from Dodd–Frank anti-retaliation remedies?

We think so. As *Berman* explained, attorneys and auditors are bound by their own professional codes and by Sarbanes–Oxley to report internally *before* reporting to the SEC[38]. They are not Dodd–Frank "whistleblowers" until they "report out" to the SEC, and under Rule 21F as currently written, not until they file a Form TCR. If they are retaliated against before then, their remedies are limited to Sarbanes–Oxley. The Courts of Appeal in both *Berman* and *Somers* considered this a major reason not to take Dodd–Frank's "whistleblower" definition seriously. However, this concern barely attracted the Supreme Court's attention. The majority opinion acknowledges that attorneys and auditors might be ineligible for Dodd–Frank remedies, but also noted that Sarbanes–Oxley had provisions specifically designed for them. The more telling argument was provided by Justice Sotomayor in oral argument. Sarbanes–Oxley *requires* attorneys and accountants to report to the SEC if the problem is not corrected. "So why," Justice Sotomayor asked, "would Congress want to treat lawyers and accountants to the generous provisions of [Dodd-Frank] when they have an obligation anyway? They're basically being incentivized to do what they're already legally obligated to do."[39]

5. Securities law interpretation after *Digital Realty*

Digital Realty is important for another, more fundamental reason. As a result of the Supreme Court's ruling, fewer persons will have access to the federal courts to pursue private remedies under the securities laws, and, notwithstanding the open questions listed above, there is a clear standard for determining which cases can proceed. Those two results continue a decades-long trend in the Supreme Court to reduce the number of private securities lawsuits and to make those few easier for the courts to resolve. Perhaps the starkest distinction between *Asadi* on the one hand and *Berman* and *Somers* on the other is how simple the reasoning of the former is as compared to the latter. The Supreme Court in effect ruled that securities law cases do not warrant the intellectual energy the Second and Ninth Circuits exerted.

The federal securities laws contain very few provisions granting private parties the right to sue. Nevertheless, from the 1930s through the 1960s the federal courts – led by the Second Circuit Court of Appeals – consistently expanded the rights of private parties to bring federal lawsuits premised on one or another of the requirements of the Securities Act or the Exchange Act. The most pervasive of those were private actions for securities frauds founded on those Acts' anti-fraud provisions, especially Sections 10(b) and 14(a) of the Exchange Act. Private litigants began to be called "private attorneys general" for their role in augmenting the enforcement resources of the SEC[40].

That evolution led to two bad ends: *First*, without clear rules, it became difficult for market participants to reliably predict the legal consequences of their actions; and *second*, the courts became burdened with large numbers of hard-to-decide cases. As those problems became more acute, judges and commentators began to espouse the virtues of simplicity. Those virtues aimed at reducing the number of private securities lawsuits generally, and at making those that were brought quicker and easier for the overburdened federal courts to decide. The turning point in the Supreme Court came between the court's 1988 decision in *Basic, Inc. v. Levinson*[41] and its 1994 decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A*[42]. In *Basic*, the Court adopted ambiguous rules for when a corporation must disclose the existence of merger discussions. The court was criticized for

not adopting bright-line tests that both corporations and courts could follow. Six years later, in *Central Bank*, a more conservative court heeded that criticism. Resorting to a plain reading of the text of the Exchange Act, the court ruled definitively that secondary actors – aiders and abettors – could not be sued in private securities lawsuits[43].

The *Central Bank* decision both reduced the universe of possible private plaintiffs and made deciding cases more efficient, and that model has come to dominate Supreme Court securities law jurisprudence ever since[44]. *Digital Realty* fits squarely into that mold. While there may be an ideological divide in the court on certain social issues, there is not much of one when it comes to interpreting the federal securities laws. Therefore, *Digital Realty* can also be read to reinforce the following principles of statutory interpretation that seem generally applicable to the federal securities laws:

- Bright-line rules will prevail over ambiguous ones.
- Simple textual readings will prevail over complex ones.
- If any two sections of an act can coexist – no matter how defanged one section may be as a result – the statute will not be seen as "ambiguous," and *Chevron* deference will not be given to the SEC.
- The interpretation that will result in fewer private lawsuits will prevail over one that encourages more of them.

Justice Ginsburg decided *Digital Realty* the way her intellectual nemesis but personal friend the late Justice Scalia would have – by following the plain language of the statute wherever it led – to a unanimous result. Both ideological wings of the Supreme Court now seem solidly to agree that the federal securities law should be interpreted and enforced as written, with minimal judicial and regulatory gloss.

Notes

1. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 225, 234 (2012).
2. 15 USC. § 78u-6.
3. 138 S.Ct. 767 (2018)
4. 15 USC. § 7201 *et seq.*
5. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1178 (2014).
6. 15 USC. § 1514(A)(c).
7. *See generally*, Karl A. Groskaufmanist, *Climbing up the Ladder: Corporate Counsel and the SEC's Reporting Requirement for Lawyers,* 89 Cornell L. Rev. 511 (2004).
8. *See generally,* Stephanie Korenman & Aegis J. Frumento, *The First Five Years of the SEC Whistleblower Program, Parts I & II,* The Corporate Counselor (May and June 2016), available at: http://sterntannenbaum.com/index.php/articles/ (accessed 7 April 2018).
9. 15 USC. § 78u-6(a)(6).
10. 15 USC. § 78u-6(j).
11. Release No. 64545 (S.E.C. Release No. 34-64545), 101 S.E.C. Docket 630, 2011 WL 2045838 at *8 (May 25, 2011) (emphasis in original).
12. Release No. 75592 (S.E.C. Release No. 34-75592), 112 S.E.C. Docket 376, 2015 WL 4624264 at *1 (August 7, 2015) (emphasis in original).
13. Release No. 75592 (S.E.C. Release No. 34-75592), 112 S.E.C. Docket 376, 2015 WL 4624264 at *1 (August 7, 2015) (emphasis in original) at *3.
14. So named after the leading case asserting that principle. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).
15. 720 F.3d 620 (5th Cir. 2013).

16. The district court cleverly side-stepped the core problem by ruling that Dodd–Frank did not protect whistleblowers who act outside the United States. But the Court of Appeals did not go there. See, *Asadi v. G.E. Energy (USA), LLC,* 2012 WL 2522599 (S.D. Texas 28 June, 2012).
17. In doing so, the Court did not address the extraterritoriality argument. Therefore, the Court of Appeals affirmed the district court's ruling but not its reasoning.
18. *Asadi, supra* at 624, n.6.
19. *Id.* at 627.
20. *Id.* at 628.
21. *Berman v. Neo@Ogilvy LLC,* 801 F.3d 145 (2d Cir. 2015).
22. *Id.* at 152.
23. *Id.* at 154.
24. *Id.* at 155.
25. *Id.* The Second Circuit decision was not unanimous. Circuit Judge Dennis Jacobs penned a vigorous dissent in which he urged that the definition of "whistleblower" was unambiguous and needed to be followed, as *Asadi* said. Interestingly, though, the dissent asserts that the majority opinion rested almost entirely on *King v. Burwell*, 135 S Ct.475 (2014). *Berman v. Neo@Ogilvy LLC,* 801 F.3d at 159. *King* is famous as the case that upheld the tax penalties in the Affordable Care Act (familiarly called "Obamacare"). But while the majority opinion discusses *King* as authority for a court resolving an ambiguous statute, in the end it chose to defer to the SEC under *Chevron.* The dissent does not mention *Chevron* deference at all. It almost seems like the majority changed the basis of its decision after reading the dissent, and the dissent did not have opportunity to reply before the opinions were released.
26. *Somers v. Digital Realty Trust, Inc.,* 850 F.3d 1045 (2017).
27. *Id.* at 1049.
28. The Ninth Circuit's unique contribution to the discussion was its refutation of *Asadi's* assertion that expanding the scope of Dodd–Frank would moot Sarbanes–Oxley's anti-retaliation remedies. The *Asadi* court hypothesized that if all whistleblowers could sue under Dodd–Frank, none would resort to Sarbanes–Oxley. However, relying on an *amicus* brief by the SEC, the *Somers* court noted that some whistleblowers might well prefer Sarbanes–Oxley's remedies to Dodd-Frank's. Administrative action through OSHA would be quicker and less costly than a federal lawsuit, and some claimants might have more special damages (that is, damages for emotional distress unavailable under Dodd–Frank) than back-pay due them. The two statutes provide alternative enforcement mechanisms that easily coexist. *Somers v. Digital Realty Trust, Inc.,* 850 F.3d at 1049-50.
29. Like *Berman*, *Somers* also had its dissenting judge. Circuit Judge Owen urged the correctness of *Asadi* and Judge Jacob's dissent in *Berman*. He too opined against over-reliance on *King v. Burwell* to justify departing from statutory text. However, the *Somers* majority did not rely on *King* to any significant degree, citing it only once for the unremarkable proposition that statutory terms can have different meanings in different contexts. That both Judge Owen and Judge Jacobs chose their dissents to target *King*, even though *King* had little significance to the majority opinion in *Somers* and *Berman*, suggests an agenda to undermine *King* that went well beyond the cases at hand.
30. *Digital Realty Trust, Inc. v. Somers,* 138 Sup.Ct. 767, 776 (2018).
31. *Id.*
32. *Id.* at 778, quoting S. Rep. No. 111-176, at 38.
33. *Id.* at 777.
34. *Id.* at 780, quoting *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247, 270 (2010).
35. Justice Sotomayor's and Justice Thomas's dueling concurrences are all about the proper use of legislative history to discern the "legislative intent". Basically, Justice Sotomayor supported Justice Ginsburg's use of a Senate Report as authority for her conclusion that the fundamental purpose of the whistleblower provisions was to motivate persons with information to "tell the SEC". Justice Thomas thought that all unnecessary. A simple reading of the definition was enough to decide that case, and no more needed – especially not congressional reports that are not written nor even read by legislators. It is an interesting debate, and says much about how the two wings of the Court think statutes should be read, but tangential to our current discussion.

36. *Id.* at 781.
37. *See, e.g.,* Whistleblower Award Proc. File No. 2014 -10, SEC Release No. 73174 (22 Sept, 2014).
38. *Berman v. Neo@Ogilvy, supra,* at 151-52.
39. Transcript of oral argument. at 35-36.
40. This history is well summarized in Adam C. Pritchard & Robert B. Thompson, *Securities Law in the Sixties: The Supreme Court, the Second Circuit, and the Triumph of Purpose Over Text*, University of Michigan Law School, Law and Economics Research Paper No. 18-004 (Feb. 2018), available at: https://ssrn.com/abstract=3119969 (accessed April 2018).
41. 485 U.S. 224 (1988).
42. 511 U.S. 164 (1994).
43. *See* Aegis J. Frumento, *Misrepresentations of Secondary Actors in the Sale of Securities: Does In Re Enron Square with Central Bank?* 59 Bus. Lawyer 975, 997 *et seq*. (2004).
44. *See, e.g., Janus Capital Group, Inc. v. First Derivative Traders,* 564 U.S. 135 (2011)(only the person with "ultimate authority" over a misleading statement can be sued for "making" it); *Morrison v. Nat'l Austl. Bank Ltd.,* 561 U.S. 247 (2010)(securities fraud provisions do not apply outside the U.S.); *Jones v. Harris Associates L.P.,* 559 U.S. 335 (2010)(enlarging threshold for liability of managers for charging excessive fees under the Investment Company Act of 1940); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta,* 552 U.S. 148 (2008)(refusing to extend private right of action for securities fraud liability to non-acting members of a "scheme"). *See generally*, Eric C. Chaffee, *The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court,* 67 Case W. Res. L. Rev. 847 (2017), available at: http://scholarlycommons.law.case.edu/caselrev/vol67/iss3/13 (accessed 10 April, 2018).

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