**Fifth Annual Supreme Court Webinar: Cases of Significance to Business**

**November 8, 2017**

***Digital Realty Trust, Inc. v. Somers***

Case Summary by Timothy Taylor

**1. Case information.**

*Digital Realty Trust, Inc. v. Somers*, No. 16-1276

* *Cert. granted:* June 26, 2017
* *Oral argument scheduled:* Nov. 28, 2017

Decisions below:

* *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (9th Cir. 2017)
* *Somers v. Digital Realty Trust Inc.*, 119 F. Supp. 3d 1088 (N.D. Cal. 2015)

**2. Question presented.**

Whether the anti-retaliation provision for “whistleblowers” in the Dodd-Frank Wall Street Reform and Consumer Protection Act extends to individuals who have not reported a violation of the securities laws to the Securities and Exchange Commission and thus fall outside the Act’s definition of a “whistleblower.”

**3. Background.**

*Digital Realty* presents an interesting question of statutory interpretation. The Sarbanes-Oxley Act of 2002 (“SOX”) prohibits retaliation against employees who disclose potential fraud or securities violations to the government *or to a supervisor*.[[1]](#footnote-1) Dodd-Frank, passed in 2010, added § 21F to the Exchange Act.[[2]](#footnote-2) This provision defines a *whistleblower* as anyone who provides “information relating to a violation of the securities laws *to the [SEC]* . . . .”[[3]](#footnote-3) Yet § 21F prohibits retaliation against “a *whistleblower* because of any lawful act done by the *whistleblower*” in doing any of three things, the third of which is most important here:

(i) in providing information to the [SEC] in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information; or

(iii) *in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002* . . . , the Securities Exchange Act of 1934 . . . , section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the [SEC].[[4]](#footnote-4)

There is tension between these two Dodd-Frank provisions. The first provision defines a *whistleblower* to include only those who report *to the SEC*. But the second provision prohibits retaliation against those who make protected disclosures under SOX—and SOX also protects those who report *to a supervisor*.[[5]](#footnote-5)

The SEC issued a rule in 2011 interpreting Section 21F in favor of broader protections for whistleblowers.[[6]](#footnote-6) The SEC’s preamble to the rule explains that whistleblowers under Dodd-Frank include those who make SOX-protected disclosures to supervisors: “[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission*.”[[7]](#footnote-7) Thus the rule states that “you are a whistleblower if … [y]ou provide information in a manner described in [any of the three ways listed in clauses (i) through (iii)].”[[8]](#footnote-8)

Most courts, applying the two-step *Chevron* framework, have held that the tension in Section 21F renders the statute ambiguous (*Chevron* step one), and have thus deferred to the SEC’s interpretation of the statute as incorporating SOX’s protections (*Chevron* step two).[[9]](#footnote-9) But some courts have disagreed with that analysis, which has led to a circuit-level split.

On one side of the split is the Fifth Circuit. It held in 2013 that § 21F is not ambiguous. “The three categories listed in [the] subparagraph ... represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.”[[10]](#footnote-10) The subparagraph simply “protects whistleblowers from retaliation for making disclosures that are required or protected under any law, rule, or regulation subject to the jurisdiction of the SEC.”[[11]](#footnote-11) The Fifth Circuit also reasoned that Dodd Frank’s § 21F could not incorporate SOX’s protections without rendering SOX’s antiretaliation remedies moot: if both protect the same conduct, aggrieved people will sue solely under Dodd Frank because its remedies are more attractive.[[12]](#footnote-12)

On the other side of the split are the Second Circuit and, now, the Ninth Circuit. The Second Circuit observed that § 21F’s provisions are “in tension” because requiring a whistleblower to report to the SEC would leave clause (iii) “with an extremely limited scope”[[13]](#footnote-13) Most people will report internally first, rather than go directly or simultaneously to the SEC.[[14]](#footnote-14) And auditors and attorneys must report internally first.[[15]](#footnote-15) That result seemed at odds with Congress’s “last-minute insertion of [clause] (iii)” and rendered § 21F “as a whole sufficiently ambiguous” to warrant *Chevron* deference to the SEC’s rule.[[16]](#footnote-16) Judge Jacobs dissented, agreeing with the Fifth Circuit that the statute is unambiguous.[[17]](#footnote-17)

The Ninth Circuit’s decision is discussed next.

**4. Procedural history.**

Paul Somers was a vice president of Digital Realty Trust.[[18]](#footnote-18) He allegedly told his former employer about potential securities violations and was fired for it.[[19]](#footnote-19) He sued for retaliation in the Northern District of California under the theory that he was a whistleblower entitled to protection under Dodd-Frank even though he had not reported his concerns to the SEC.[[20]](#footnote-20)

The district court agreed. Judge Edward Chen wrote a lengthy opinion denying the defendants’ motion to dismiss Somers’ Dodd-Frank retaliation claim.[[21]](#footnote-21) On an interlocutory appeal of that decision, the Ninth Circuit affirmed.[[22]](#footnote-22)

The Ninth Circuit’s analysis was similar to the Second Circuit’s. The Ninth Circuit noted that Dodd-Frank would leave whistleblowers little protection if they had to report to the SEC first or simultaneously, and would leave virtually no protection for auditors or attorneys.[[23]](#footnote-23) “Leaving employees without protection for that required preliminary step [of reporting internally] would result in early retaliation before the information could reach the regulators.”[[24]](#footnote-24) As for the plain text of the statute, the court relied on *King* for the proposition that “[t]he use of a term in one part of a statute ‘may mean a different thing’ in a different part, depending on context.”[[25]](#footnote-25) And definitions are “just one indication of meaning.”[[26]](#footnote-26) Finally the Ninth Circuit responded to the Fifth Circuit’s concerns about Dodd-Frank swallowing SOX’s anti-retaliation provisions. The court stated that Dodd-Frank’s remedial scheme is not always better than SOX’s. Dodd-Frank offers double back-pay damages, but SOX offers single back-pay *and* tort damages; Dodd-Frank allows plaintiffs to file in federal court, while SOX requires plaintiffs to turn over their claims to the Department of Labor—but that is a cheaper and simpler mechanism that some plaintiffs might prefer.[[27]](#footnote-27) Thus, the court held, § 21F is ambiguous and the SEC’s rules interpreting it were owed deference.[[28]](#footnote-28)

Judge Owens dissented, citing the Fifth Circuit’s opinion and Judge Jacobs’ dissent in the Second Circuit.[[29]](#footnote-29) He worried in particular about the majority’s reliance on *King*, citing colorful authority in response: “[W]e should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level. *Cf. John Carpenter's The Thing* (Universal Pictures 1982).”[[30]](#footnote-30)

**5. Arguments.**

**Petitioner Digital Realty Trust, Inc.**

Digital Realty’s argument follows the standard four-part outline typically used for questions of statutory interpretation: (1) the plain meaning of the text; (2) the structure of the statute; (3) legislative history; and (4) congressional purpose.[[31]](#footnote-31)

**1.** Digital Realty’s plain-meaning argument is straightforward. “[W]here a statute includes an express definition of a term, courts and agencies may not invent a different definition. In adopting a definition of ‘whistleblower’ that is more expansive than the one Congress actually provided in the Dodd-Frank Act, the Ninth Circuit and the SEC violated that unimpeachable principle.”[[32]](#footnote-32)

**2.** Digital Realty’s structural argument is different from those discussed in the opinions of the Second, Fifth, and Ninth Circuits. It argues first that § 21F “whistleblowers” are only those people who report to the SEC because the rest of § 21F discusses the monetary bounties available only to those who report to the SEC.[[33]](#footnote-33) “Extending anti-retaliation protection to individuals who have not reported securities-law violations to the SEC would divorce the anti-retaliation provision from the rest of the section.”[[34]](#footnote-34) Digital Realty also argues that § 21F contrasts with another provision in Dodd-Frank protecting “covered employees” whether or not they disclose to the SEC.[[35]](#footnote-35)

**3.** Digital Realty’s legislative-history argument is similar to its structural argument. Digital Realty observes that § 21F was written “to enlist whistleblowers to ‘assist the [g]overnment to identify and prosecute persons who have violated securities laws’ and thereby ‘recover money for victims of financial fraud.’”[[36]](#footnote-36) Congress provided these whistleblowers with both a monetary reward and protection from retaliation forproviding information to the SEC.[[37]](#footnote-37) Additionally, while the House version of § 21F protected any “employee, contractor, or agent,” the later Senate version of § 21F (the one eventually enacted) replaced that phrase with the narrower, defined term “whistleblower.”[[38]](#footnote-38)

**4.** Digital Realty’s congressional-purpose argument focuses on the differences between the SOX and Dodd-Frank antiretaliation regimes. SOX was enacted to “prevent and punish corporate and criminal fraud,” and its antiretaliation provision protects those who internally or externally report SEC violations or certain kinds of fraud.[[39]](#footnote-39) Dodd-Frank’s antiretaliation provision gives plaintiffs even greater protections to further incentivize reporting to the SEC.[[40]](#footnote-40) “The Ninth Circuit’s interpretation of the Dodd-Frank Act’s provision would upset the balance between the two provisions, giving plaintiffs procedural advantages and remedies that Congress deliberately rejected in the Sarbanes-Oxley Act and thus threatening to render the Sarbanes-Oxley Act’s provision effectively obsolete.”[[41]](#footnote-41)

Digital Realty also argues that the SEC’s interpretation warrants no deference. The definition is unambiguous, while “the SEC simply picked and chose the elements of the statutory definition that it liked.”[[42]](#footnote-42) And the SEC promulgated its broader definition of “whistleblower” for the first time in the final rule, without explanation or notice, in violation of administrative procedure.[[43]](#footnote-43)

Digital Realty also addresses some counterarguments to its position. *First*, Digital Realty argues that while its interpretation of the statute narrows the instances in which clause (iii) will have effect (the primary concern of the Second and Ninth Circuits), that narrowing both is less dramatic than courts have assumed and merely renders the clause more modest rather than superfluous.[[44]](#footnote-44) And lawyers and auditors remain protected by SOX regardless.[[45]](#footnote-45)

*Second*, Digital Realty argues that both § 21F’s definition of “whistleblower” and the protected activity in clauses (i) and (ii) refer to disclosures “to the [SEC].” The SEC has argued that those words in clauses (i) and (ii) are redundant, unless the “whistleblower” referenced in clauses (i)–(iii) is different from the “whistleblower” in the definition.[[46]](#footnote-46) Digital Realty counters that Congress can use “technically unnecessary” language without rendering a statute absurd.[[47]](#footnote-47)

*Third*, Digital Relaty argues that *King* has little to do with the current case, both because *King* interpreted a 900-page interlocking statute rather than one simple section and because there is no ambiguity in § 21F.[[48]](#footnote-48)

**Respondent Paul Somers.**

Somers’s argument follows the same four-part outline as Digital Realty’s: (1) the plain meaning of the text; (2) the structure of the statute; (3) legislative history; and (4) congressional purpose.[[49]](#footnote-49)

**1.** Somers’s textual argument posits that the definition of “whistleblower” (someone who reports to the SEC) at the beginning of § 21F does not necessarily control the meaning of “whistleblower” in clause (iii) of that section.[[50]](#footnote-50) The definition creates a presumption, but not an absolute requirement.[[51]](#footnote-51) That presumption is overcome here and leads to ambiguity, says Somers, for several reasons. Clause (iii) references a provision of SOX that does not require reporting to the SEC, which makes the definition an odd fit textually.[[52]](#footnote-52) Neighboring sections referencing the whistleblower’s cause of action for retaliation use terms like “employee” and “individual,” suggesting that the term “whistleblower” was not meant as a term of art in clause (iii).[[53]](#footnote-53) The same section of Dodd-Frank that enacted § 21F also amended the antiretaliation provisions of SOX and labeled those amendments “whistleblower protections.”[[54]](#footnote-54) And § 21F is directed toward the acts that *employers* may not punish, suggesting that Congress did not in the same breath intend to provide those employers with an open back door to escape the section’s prohibitions.[[55]](#footnote-55)

**2.** Somers’s structural argument posits that § 21F provides a monetary reward for reporting to the SEC, which makes sense because the reward is tethered to government action on those reports.[[56]](#footnote-56) But it does not follow that the antiretaliation provisions should be limited to those who report to the SEC. Congress meant to protect internal reporting as well.[[57]](#footnote-57) And the use of the redundant words “to the [SEC]” in clauses (i) and (ii) at least “suggests tension with the presumption that whistleblower was not used in its ordinary sense.”[[58]](#footnote-58)

**3.** Somers’s legislative-history argument posits that “it is not at all surprising that,” when clause (iii) was inserted at the last minute, “no one noticed that the new subdivision and the definition of ‘whistleblower’ do not fit together neatly.”[[59]](#footnote-59) Digital Realty’s argument that § 21F was intended to fit together in a tight scheme do not adhere to the chronology of the bill’s amendments.[[60]](#footnote-60)

**4.** Somers’s argument from congressional purpose posits that Digital Realty’s interpretation would upset the functioning of both SOX and Dodd-Frank. That interpretation would encourage external reporting to the SEC at the expense of internal reporting, which was a primary objective of SOX.[[61]](#footnote-61) It would also eviscerate Dodd-Frank, for if employees are afraid to report internally (as attorneys and auditors must), they will rarely progress to reporting to the SEC.[[62]](#footnote-62) What would be left is a statutory scheme whose protections rely on how quickly employers retaliate and which would depend on an employer’s knowledge of an employee’s reporting to the SEC, which they rarely know of.[[63]](#footnote-63) Finally, Digital Realty’s interpretation would not make SOX’s scheme obsolete. As described by the Ninth Circuit, the remedial schemes are different, not superior and inferior.[[64]](#footnote-64)

**6. Highlights from the amici.**

* The United States filed an amicus brief in favor of the respondent, largely mirroring his arguments.[[65]](#footnote-65)
* So did Senator Grassley. He is well-known for “author[ing] and promot[ing] in Congress numerous pivotal statutes that protect whistleblowers and incentive them ....”[[66]](#footnote-66)
* One amicus details the regulatory history of the SEC’s rule, arguing that the SEC gave no notice that its final rule would change the definition of whistleblowers entitled to antiretaliation protection.[[67]](#footnote-67) But another amicus, heavily involved in the SEC’s processes, argues that “the regulated community, en masse, strongly urged the SEC to define the ‘manner’ an employee could qualify as a ‘whistleblower’ to include persons who reported violations internally.”[[68]](#footnote-68)
* The Chamber of Commerce disputes the notion that SOX’s and Dodd-Frank’s remedial schemes are merely different. It states that awards of double-backpay under Dodd-Frank are typically higher than awards of tort damages under SOX.[[69]](#footnote-69)

**7. Implications.**

If the Ninth Circuit’s decision is affirmed, the real-world consequences for employers are unclear. On the one hand, employees who report internally would be protected from retaliation. This would encourage internal reporting, which most employers view as a more favorable action by employees than external reporting. But on the other hand, it would grant those internally reporting employees more leverage. They could bring suit immediately in federal court rather than go through an administrative process. They could wait years to bring that suit rather than act within SOX’s 180-day time limit. And they could receive double back-pay, rather than single back-pay. And its possible such employees could get two bites at the apple. If a first claim under SOX fails, they could then sue in federal court under Dodd-Frank.

More broadly, encouraging internal reporting may, ironically, result in more securities fraud being exposed than a regime that encourages external reporting. Some of the amici discuss the data, which shows that far more corporate malfeasance comes from employee tips than from management detection, auditing, or government investigations.

1. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802–03*, codified as amended at* 18 U.S.C. § 1514A(a)(1); *see also Digital Realty*, 850 F.3d at 1048. [↑](#footnote-ref-1)
2. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841–49 (2010), *codified at* 15 U.S.C. § 78u-6 (Exchange Act § 21F). [↑](#footnote-ref-2)
3. 15 U.S.C. § 78u-6(a)(6) (emphasis added). [↑](#footnote-ref-3)
4. 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). [↑](#footnote-ref-4)
5. *See Somers v. Digital Realty Trust, Inc.*, 119 F. Supp. 3d 1088, 1098 (N.D. Cal. 2015) (internal quotation marks omitted) (“As a number of courts have recognized, this [clause (iii)] appears to be in direct conflict with [Dodd Frank’s] definition of a whistleblower because [clause (iii)] provides protection to persons who have not disclosed information to the SEC, while [the definition] requires the person report to the [SEC].”). [↑](#footnote-ref-5)
6. *See* Securities Whistleblower Incentives and Protections (Adopting Release), 78 Fed. Reg. 34300, 34301–34304 (June 13, 201), *codified at* 17 C.F.R. § 240.21F-2. [↑](#footnote-ref-6)
7. *Id.* at 34304 (emphasis added). [↑](#footnote-ref-7)
8. 17 C.F.R. § 240.21F-2(b)(1). [↑](#footnote-ref-8)
9. *See Digital Realty*, 119 F. Supp. 3d at 1097 (quoting *Connolly v. Remkes*, No. 5:14-cv-1344-LHK, 2014 WL 5473144, at \*5 (N.D. Cal. Oct. 28, 2014)); *see also id.* at 1097 n.3 (collecting cases); *Berman v. Neo@ Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015) (collecting more cases). [↑](#footnote-ref-9)
10. *Asadi v. GE Energy (USA), LLC*, 720 F.3d 620, 625 (5th Cir. 2013). [↑](#footnote-ref-10)
11. *Id.* [↑](#footnote-ref-11)
12. *See id.* at 628–29. [↑](#footnote-ref-12)
13. *Id.* at 151. [↑](#footnote-ref-13)
14. *See id.* [↑](#footnote-ref-14)
15. *See id.*at 151–52. [↑](#footnote-ref-15)
16. *Id.* at 155. [↑](#footnote-ref-16)
17. *See id.* at 155–60 (Jacobs, J., dissenting). [↑](#footnote-ref-17)
18. *See Digital Realty*, 119 F. Supp. at 1092. [↑](#footnote-ref-18)
19. *See id.* [↑](#footnote-ref-19)
20. *See id.*; *see also Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1047 (9th Cir. 2017). Somers brought other claims as well, none of which are relevant here. *See Digital Realty*, 119 F. Supp. 3d at 1091. [↑](#footnote-ref-20)
21. *See generally Digital Realty*, 119 F. Supp. 3d 1088. [↑](#footnote-ref-21)
22. *See Digital Realty*, 850 F.3d at 1047. [↑](#footnote-ref-22)
23. *See id.* at 1049–50. [↑](#footnote-ref-23)
24. *Id.* at 1049. [↑](#footnote-ref-24)
25. *Id.* (quoting *King*, 135 S. Ct. at 2493 n.3). [↑](#footnote-ref-25)
26. *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012)). [↑](#footnote-ref-26)
27. *See id.* at 1050. [↑](#footnote-ref-27)
28. *See id.* at 1050–51. [↑](#footnote-ref-28)
29. *See id.* at 1051 (Owens, J., dissenting). [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. *See* Br. for Petitioner at III, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Aug. 2017). [↑](#footnote-ref-31)
32. *Id.* at 12. [↑](#footnote-ref-32)
33. *See id.* at 20–23. [↑](#footnote-ref-33)
34. *Id.* at 23. [↑](#footnote-ref-34)
35. *See id.* at 23–24. [↑](#footnote-ref-35)
36. *Id.* at 24 (quoting S. Rep. No. 176 (2010) at 110). [↑](#footnote-ref-36)
37. *See id.* at 24–25. [↑](#footnote-ref-37)
38. *See id.* at 25–26. [↑](#footnote-ref-38)
39. *See id.* at 26–27. [↑](#footnote-ref-39)
40. *See id.* at 27–30. [↑](#footnote-ref-40)
41. *Id.* at 28–29. [↑](#footnote-ref-41)
42. *Id.* at 40; *see also id.* at 41 (*Chevron* “does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.” (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015))). [↑](#footnote-ref-42)
43. *See id.* at 41–45. [↑](#footnote-ref-43)
44. *See id.* at 31–33. [↑](#footnote-ref-44)
45. *See id.* at 33–35. [↑](#footnote-ref-45)
46. *See id.* at 36. [↑](#footnote-ref-46)
47. *Id.* (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008) (citation omitted)). [↑](#footnote-ref-47)
48. *See id.* at 36–37. [↑](#footnote-ref-48)
49. *See* Brief for Respondent at I, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Oct. 2017). [↑](#footnote-ref-49)
50. *See id.* at 25–26. [↑](#footnote-ref-50)
51. *See id.* [↑](#footnote-ref-51)
52. *See id.* at 26, 28–29. [↑](#footnote-ref-52)
53. *See id.* at 26–27. Somers similarly argues that those close-by sections are more telling than the use of the term “covered employee” in Dodd-Frank’s far-flung provisions regarding the Consumer Financial Protection Bureau. *See id.* at 32–33. [↑](#footnote-ref-53)
54. *See id.* at 27–28. [↑](#footnote-ref-54)
55. *See id.* at 29. [↑](#footnote-ref-55)
56. *See id.* at 30. [↑](#footnote-ref-56)
57. *See id.* [↑](#footnote-ref-57)
58. *Id.* at 31. [↑](#footnote-ref-58)
59. *Id.* at 40 (quoting *Neo@ Ogilvy*, 801 F.3d at 154). [↑](#footnote-ref-59)
60. *See id.* at 41–42. [↑](#footnote-ref-60)
61. *See id.* at 33–34. [↑](#footnote-ref-61)
62. *See id.* at 34–37. [↑](#footnote-ref-62)
63. *See id.* at 37. [↑](#footnote-ref-63)
64. *See id.* at 38–39. [↑](#footnote-ref-64)
65. *See* Brief for the United States as Amicus Curiae Supporting Respondent, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Aug. 2017). [↑](#footnote-ref-65)
66. Brief of Sen. Charles Grassley as *Amicus Curiae* in Support of Respondent at 1, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Aug. 2017). [↑](#footnote-ref-66)
67. *See* Brief of the Cato Inst. as *Amicus Curiae* Supporting Petitioner, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Oct. 2017). [↑](#footnote-ref-67)
68. *See* Brief for the Nat’l Whistleblower Ctr. et al. as *Amici Curiae* in Support of Respondent, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Aug. 2017). [↑](#footnote-ref-68)
69. Brief of the Chamber of Commerce of the U.S.A. as *Amicus Curiae* Supporting Petitioner at 19–21, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Aug. 2017). [↑](#footnote-ref-69)