NYU LAW
MOOT COURT BOARD

Case Number 40-013

Union Allied Corporation,
Petitioner,

-against-

Karen Page,
Respondent.

Record

Prepared by:
Elena Hadjimichael

Supervising Editors: Anja Watt and Kristen Nicol

UnionAllied

PERFORMANCE REVIEW

Employee Name: Karen Page
Job Title: Secretary
Reviewer Name: Michael McClintock
Date of Review: 06/27/2014

JOB PERFORMANCE FACTORS:

1. **Is a willing worker in assigned responsibilities.**

☐ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☑ OUTSTANDING

Comments: Karen is a very fast and prompt worker. Consistently exceeds job requirements.

2. **Demonstrates a high degree of skill and proficiency in carrying out assignments.**

☐ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☑ OUTSTANDING

Comments: Karen knows her job so well that other co-workers rely upon her to answer job-related questions. She is an asset to her team.

3. **Strives to improve work methods as a means towards greater efficiency.**

☐ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☑ OUTSTANDING

Comments: Karen looks for ways to do her job better. She has made suggestions about her work that have resulted in increases in efficiency. She is able to work in any area assigned to her.

4. **Is willing to take on additional responsibilities.**

☐ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☑ OUTSTANDING

Comments: Karen is a self starter. She goes out of her way to accept responsibility and regularly seeks new tasks.

5. **Does not require constant supervision. Sees what should be done and does it without direction.**

☐ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☑ OUTSTANDING

Comments: Karen works without direction for long periods of time. She understands job functions well enough to structure all priorities and move quickly from one unrelated task to another.

UnionAllied

December 15, 2014

Ms. Karen Page
810 Thirteenth Avenue, #1B
Marvel West, Hell's Kitchen
10019

RE: END-OF-YEAR BONUS

Dear Ms. Page,

We are pleased to offer you the enclosed End-of-Year Bonus with our very best wishes for a happy holiday season.

We wish to thank you for your continued dedication and role in making 2014 the most successful year in the history of our firm, and we are all looking forward to a prosperous new year.

To your family, we extend our very best wishes for a Merry Christmas and a Happy New Year.

Sincerely,

Michael McClintock
Director, Investment Banking

Dmail

Question for you

2 messages

to: Karen Page <kpage@dmail.com>
from: Foggy Nelson <foghorn@dmail.com>
subject: Re: Question for you
date: Sun, Apr 13, 2015 at 11:43AM

Woah Karen! Why do you ask? Is everything okay? Is something going on at work? Anyway you know I can't give you official legal advice at this stage but yeah it sounds like what you're "hypothetically" describing would violate the Banking Secrecy Act (that's part of the SEA). We need to talk over eel drank next weekend it seems. Don't do anything I wouldn't do…

---

to: Franklin "Foggy" Nelson <franklin.nelson@landmanzack.com>
from: Karen Page <kpage@dmail.com>
subject: Question for you
date: Sat, Apr 12, 2015 at 2:14AM

Hey Foggy,

Hope all is going well at the new firm! We need to catch up over eel drink at Josie's sometime soon.

I know this is a strange request, but… can I ask you something about securities law? I've learned a lot while working at Union Allied but it's all so complicated. So I know that broker-dealers need to have money laundering monitoring systems in place. But if a firm hypothetically weren't actually monitoring ML properly and one of their foreign clients ended up being involved in something really… shady, that's bad right? Like, SEC violation level bad?

Anyway, hope you're doing well and sorry to bother you with this out of the blue. Let me know about that drink. ☺

K

UnionAllied

PERFORMANCE REVIEW

Employee Name: Karen Page
Job Title: Secretary
Reviewer Name: Michael McClintock
Date of Review: 07/17/2015

JOB PERFORMANCE FACTORS:

1. **Is a willing worker in assigned responsibilities.**

☑ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☐ OUTSTANDING

Comments: Karen is a slow worker. She does little work. She wastes time and often needs pushing.

2. **Demonstrates a high degree of skill and proficiency in carrying out assignments.**

☐ UNSATISFACTORY ☑ MARGINAL ☐ EFFECTIVE ☐ OUTSTANDING

Comments: Karen has an inadequate knowledge of her duties. Her lack of proficiency in performing her job often leads to difficulties. She cannot be counted on to perform all of her job duties satisfactorily. Often needs instructions.

3. **Strives to improve work methods as a means towards greater efficiency.**

☑ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☐ OUTSTANDING

Comments: Karen shows no interest in improving her work methods. She never makes suggestions about how work might be improved. She probably would not try to function more efficiently even if it occurred to her.

4. **Is willing to take on additional responsibilities.**

☑ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☐ OUTSTANDING

Comments: Karen never volunteers to undertake work. She requires constant prodding to work. She will not accept responsibility.

5. **Does not require constant supervision. Sees what should be done and does it without direction.**

☑ UNSATISFACTORY ☐ MARGINAL ☐ EFFECTIVE ☐ OUTSTANDING

Comments: Karen requires constant supervision. She cannot work satisfactorily without someone monitoring work on a continuing basis. Cannot determine what needs to be done.

▲UnionAllied

September 17, 2015

Ms. Karen Page
810 Thirteenth Avenue, #1B
Marvel West, Hell's Kitchen
10019

RE: SEVERANCE AGREEMENT AND RELEASE

Dear Ms. Page,

This letter summarizes the terms of your separation from employment with Union Allied Corp. (the "Company"). The purpose of this letter (the "Agreement") is to establish an amicable arrangement for ending your employment relationship, to release the Company from all legally waivable claims and to permit you to receive severance pay and related benefits. The terms of your separation are as follows:

1. Employment Status and Final Payments:

(a) Termination Date: Your termination from employment with the Company will be effective as of October 9, 2015 (the "Termination Date"). As of the Termination Date, your salary stops, and any entitlement you had or might have had under a Company-provided benefit plan, program, contract or practice will be terminated, except as required by federal or state law.

(b) Final Wages: You will receive a check on the Termination Date for all earned salary and for all accrued but unused vacation time.

2. Consideration: In exchange for, and in consideration of, your full execution of this Agreement, the Company agrees to pay you a lump sum severance payment in the amount of Fifteen Thousand Dollars ($15,000), less applicable withholding and/or payroll taxes. This sum will be paid no later than seven (7) calendar days from the signing of this Agreement.

3. Release: In exchange for the amounts and benefits described in Section 2, you and your representatives, agents, estate, heirs, successors and assigns, absolutely and unconditionally release, discharge, indemnify and hold harmless the Company Releasees, from any and all legally waivable claims that you have against the Company Releasees. You are agreeing not to bring a legal action against the Company Releasees for any type of claim arising from conduct that occurred any time in the past and up to and through the Termination Date. Company Releasees is defined to include (i) the Company and/or any of its parents, subsidiaries or affiliates, predecessors, successors or assigns; (ii) all of the existing direct and indirect shareholders of the Company and all affiliates thereof.

4. Accord and Satisfaction: The amounts set forth above in Sections 1 and 2 will be complete and unconditional payment, accord and/or satisfaction with respect to all obligations and liabilities of the Company Releasees to you, including, without limitation, all claims for back

wages, salary, vacation pay, draws, incentive pay, bonuses, commissions, severance pay, any and all other forms of compensation or benefits, attorney's fees, or other costs or sums.

5. Company Files, Documents and Other Property; Post-Employment Obligations: You agree that on or before October 9, 2015, you will return all Company owned equipment, materials, confidential information and any other property.

6. Future Conduct:

(a) Nondisparagement: You agree not to make disparaging, critical or otherwise detrimental comments to any person or entity concerning the Company, its officers, directors or employees; the products, services or programs provided by the Company; the business affairs, operation, management or the financial condition of the Company; or the circumstances surrounding your employment and/or separation of employment from the Company.

(b) Confidentiality of this Agreement: You agree that you will not disclose, divulge or publish, directly or indirectly, any information regarding the substance, terms or existence of this Agreement and/or any discussion relating to this Agreement, to any person or organization.

7. Representations: This Agreement sets forth the complete and sole agreement between the parties regarding the subject matter addressed in this document. This Agreement may not be changed, amended, modified, or rescinded except upon the express written consent of both the Chief Executive Officer of the Company and you.

Sincerely,

Union Allied Corp.

By:

James Westley
Chief Executive Officer

I REPRESENT THAT I HAVE READ THIS AGREEMENT, THAT I UNDERSTAND THE TERMS AND CONDITIONS OF THE AGREEMENT AND THAT I AM KNOWINGLY AND VOLUNTARILY EXECUTING THE AGREEMENT. I DO NOT RELY ON ANY REPRESENTATION, PROMISE OR INDUCEMENT MADE BY THE COMPANY OR ITS REPRESENTATIVES WITH THE EXCEPTION OF THE CONSIDERATION DESCRIBED IN THIS DOCUMENT.

Accepted and Agreed to:

I'M NOT SIGNING?

_____

Date:

NEW YORK BULLETIN
★★FINAL★★
NOVEMBER 1, 2015 $1.95

UNION ALLIED MONEY LAUNDERING SCANDAL

Hell's Kitchen-based broker-dealer firm Union Allied is under investigation by the Securities and Exchange Commission this month. Information brought to light by a courageous whistleblower indicates that holes in Union Allied's customer-identification program have allowed suspect foreign entities and their owners to buy and sell millions of dollars in securities through Union Allied's exchanges.

Among the list of foreign clients whose identities were never properly collected, verified, or documented are Gao Industries and Serpent Steel, two Chinese corporations suspected of laundering money generated by an international heroin smuggling ring. Due to the laxity of their record keeping and reporting, Union Allied may have been responsible for allowing this money to enter the U.S. financial market. • **Story continues on page 3**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HELL'S KITCHEN

Karen Page, Plaintiff,	:	Case No. 29-9620
-against-	:	OPINION AND ORDER
Union Allied Corporation, Defendant.	:	December 1, 2015

Counsel:
For Karen Page, Plaintiff: Franklin Nelson, LEAD ATTORNEY, Landman & Zack LLP – Marvel West, HK.

For Union Allied Corporation, Defendant: Leland Owlsley, LEAD ATTORNEY, Silver & Brent LLP – Marvel West, HK.

Judges: MARCIE STAHL, United States District Judge.

STAHL, J.:

Plaintiff Karen Page has filed a complaint that asserts retaliation claims against her former employer, Union Allied Corporation, pursuant to 15 U.S.C. § 78u-6(h)(1)(a)(iii). Defendant has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, as plaintiff does not qualify as a "whistleblower" under 15 U.S.C. § 78u-6. Because we agree with defendant's interpretation of 15 U.S.C. § 78u-6, defendant's motion is granted.

BACKGROUND

Plaintiff began working in May 2013 as a secretary for Defendant Union Allied Corporation, a publicly traded broker-dealer firm incorporated in Hell's Kitchen. Union Allied is a subsidiary of the investment company, Confederated Global Investments. Plaintiff alleges that in her role she learned that Union Allied was not complying with its obligations under Section 17(a) of the Securities Exchange Act of 1934 and Exchange Rule 17a-8, which require broker-dealers to comply with the anti-money laundering reporting and record-keeping requirements of the Bank Secrecy Act.

On April 10, 2015, plaintiff received an e-mail intended for her supervisor, Michael McClintock. A file attached to the e-mail indicated that a number of the

firm's Chinese clients were involved in suspicious transactions, and that the identity of these entities had never been verified or recorded. The same day, plaintiff reported her concerns about improper monitoring and record-keeping to McClintock. At this time McClintock assured plaintiff that everything was in order. On July 17, 2015, plaintiff received an unexpectedly negative performance review. On September 17, 2015, McClintock, the CEO of Union Allied, and an attorney representing the firm held a meeting with plaintiff. At this meeting, McClintock informed plaintiff that she was no longer a good fit within the Union Allied financial department. He offered plaintiff a severance package that included a lump sum in exchange for signing a non-disclosure agreement and releasing any claims against Union Allied. Plaintiff refused to sign the severance agreement. Union Allied subsequently terminated her employment on October 9, 2015.

DISCUSSION

Plaintiff's complaint alleges that defendant violated Dodd–Frank by retaliating against her after she internally reported what she believed to be a violation of securities law. Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd–Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), in response to the 2008 economic crisis. Section 922 of Dodd–Frank added section 21F to the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78u-6. Section 21F, entitled "Securities whistleblower incentives and protection," encourages individuals to provide information regarding securities violations to the Securities and Exchange Commission (SEC).

Dodd–Frank explicitly defines the term "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." 15 U.S.C. § 78u-6(a)(6) (emphasis added). The anti-retaliation provision of Dodd–Frank provides that an employer may not retaliate in response to the following categories of lawful activities performed by the whistleblower:

> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures *that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.)*, this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). Subsections (i) and (ii) refer to reports made "to the Commission" and actions related to such reports. Subsection (iii) references disclosures protected or required by the Sarbanes–Oxley Act of 2002 ("Sarbanes–Oxley"), Pub. L. No. 107-204, 116 Stat. 745 (2002). Sarbanes–Oxley, in turn, protects employees who provide information they reasonably believe relates to securities law violations, including reports made to "a person with supervisory authority over the employee." 18 U.S.C. § 1514A(a)(1)(C).

Pointing to *Asadi v. G.E. Energy U.S., LLC*, 720 F.3d 620, 630 (5th Cir. 2013), defendant argues that plaintiff cannot be protected under Dodd–Frank because she did not report information to the SEC and therefore does not qualify as a "whistleblower" as defined by the Act. Plaintiff relies on conflicting authority from the Second Circuit, which has held that a plaintiff who does not report to the SEC but makes internal disclosures required or protected under Sarbanes–Oxley qualifies as a "whistleblower" for purposes of retaliation protection. *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 U.S. App. LEXIS 16071, at *3 (2d Cir. Sept. 10, 2015). Plaintiff contends that she is a whistleblower because she expressed concerns about Union Allied's compliance with securities law to her supervisor. This is a question of first impression in the Fourteenth Circuit.

In determining whether internal reporting is sufficient to entitle plaintiff to "whistleblower" protection under Dodd–Frank, the first step is to determine whether the statute is ambiguous. If we determine that "the statutory text is plain and unambiguous . . . we must apply the statute according to its terms." *Asadi*, 720 F.3d at 622 (quoting *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."). If, however, we find the statute ambiguous, we will look to reasonable administrative regulations for clarification. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (setting forth a two-step analysis of whether an agency interpretation is permissible: first, determining whether there is an "unambiguously expressed intent of Congress" on "the precise issue in question," and, second, if the statute is silent or ambiguous, determining whether the agency's interpretation is "based on a permissible construction of the statute.").

Applying this approach and looking first at the statutory text, the statute is not ambiguous. The plain language of the Act makes explicit that an individual must provide information "to the Commission" in order to qualify as a "whistleblower" under the definitional section. 15 U.S.C. § 78u-6(a)(6). Section 78u-6(h)(1)(A) is also explicit in restricting anti-retaliation protection to actions performed by a "whistleblower." 15 U.S.C. § 78u-6(h)(1)(A) ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of

any lawful act done by the whistleblower . . . ."). Congress could easily have used a word other than "whistleblower," but, significantly, it did not. *See Asadi*, 720 F.3d at 626 (noting that the text would admit of a broader protection if instead "Congress had selected the terms 'individual' or 'employee'"). Statutory definitions should be applied to all sections of the statute that they cover. *See* Antonin Scalia & Bryan A. Garner, Reading Law 227 (2012) ("Ordinarily, judges apply text-specific definitions with rigor.").

This Court is also guided by the surplusage canon in which every word of a statute is to be given effect. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)). Plaintiff argues that applying the statutory definition of "whistleblower" to the whistleblower protection provision would render section 78u-6(h)(1)(A)(iii) superfluous. We disagree.

As the Fifth Circuit noted, reading section 78u-6(h)(1)(A)(iii) in light of the preceding text of section 78u-6(h)(1)(A), prohibits an employer from retaliating against a *whistleblower* who makes a report pursuant to Sarbanes–Oxley; it does not create a new category of internal whistleblower. *See Asadi*, 720 F.3d at 627 (observing that section 78u-6(h)(1)(A)(iii) "protects whistleblowers from retaliation, based not on . . . disclosure of information to the SEC but, instead, on . . . other possible required or protected disclosure(s)"). For example, an individual who makes simultaneous reports to his own company and to the SEC may be fired before his company becomes aware of the SEC disclosure. This individual would qualify as a "whistleblower" as defined in section 78u-6(a)(6), but because he could not prove that he was retaliated against for his report to the SEC, he would not be protected by sections 78u-6(h)(1)(A)(i) or (ii). He would, however, be protected against retaliation by section 78u-6(h)(1)(A)(iii). Because subsection (iii) protects activity that subsections (i) and (ii) do not, subsection (iii) is not made superfluous by observing the SEC notification requirement. *See id.* at 627–628. Furthermore, reading section 78u-6(h)(1)(A)(iii) as an exception to the section 78u-6(a)(6) definition of "whistleblower" would itself violate the surplusage canon, rendering the words "to the Commission" superfluous. *See id.* at 628; *Berman*, 2015 U.S. App. LEXIS 16071, at *28 (Jacobs, J., dissenting) ("The majority and the Securities and Exchange Commission . . . have altered a federal statute by deleting three words ('to the Commission') from the definition of 'whistleblower' in the Dodd-Frank Act.").

Because Congress unambiguously defined "whistleblower" and specified that protected against retaliation is available for the whistleblower's protected activities, Congress has directly addressed the question at issue. There is therefore no need for this Court to defer to the SEC's broad interpretation of the term "whistleblower" for purposes of anti-retaliation protection under Dodd–Frank. *See Chevron*, 467 U.S.at

842–44, (noting that deference is due to the agency's construction only "if the statute is silent or ambiguous"). We conclude that whistleblower protection is limited to individuals who report violations to the SEC and that plaintiff was therefore not afforded protection under Dodd–Frank.

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Karen Page, Plaintiff-Appellant,	:	OPINION AND ORDER
-against-	:	Case No. 13-021991
Union Allied Corporation, Defendant-Appellee.	:	February 10, 2016

Before MURDOCK, C.J., LANTOM and TEMPLE, JJ.

MURDOCK, Chief Judge:

Plaintiff-Appellant Karen Page appeals the decision of the District Court of Hell's Kitchen granting Defendant-Appellee Union Allied's motion to dismiss her case for failure to state a claim.

The appeal turns on whether Page qualifies as a "whistleblower" under the Dodd–Frank Act. Union Allied argues that Page is not a whistleblower because she did not report the alleged securities violations to the SEC prior to her termination. Union Allied contends that Page's internal reporting of the alleged violations before being terminated was not sufficient to entitle her to protection under the statute's anti-retaliatory provision. Page contends that the statute's "catch-all" provision incorporates sections of the Sarbanes–Oxley Act, which in turn affords protections to whistleblowers who only report violations internally.

This Court adopts the factual findings of the district court and reviews the question of interpretation of Dodd–Frank *de novo*. Because we conclude that sufficient ambiguity exists between the implicated provisions of Dodd–Frank, we defer to the SEC's interpretive rule, under which plaintiff-appellant would be protected from retaliation. Accordingly, we REVERSE the court below.

RELEVANT STATUTORY PROVISIONS

Dodd–Frank defines a "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." 15 U.S.C. § 78u-6(a)(6).

Meanwhile, section 78u-6(h)(1)(A) provides that an employer may not retaliate in response to the following whistleblower actions:

> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures *that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.)*, this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). The Sarbanes–Oxley Act of 2002 ("Sarbanes–Oxley"), Pub. L. No. 107-204, 116 Stat. 745 (2002), referenced in subsection (iii), is an act that includes a number of provisions concerning the internal reporting of securities law violations. Section 806 of Sarbanes–Oxley prohibits a publicly traded company from retaliating against an employee who provides information concerning securities law violations to, among others, "a person with supervisory authority over the employee." 18 U.S.C. § 1514A(a)(1)(C).

AGENCY'S STATUTORY INTERPRETATION

In 2011, the SEC promulgated a final rule clarifying the Dodd–Frank whistleblower provision. *See* 17 C.F.R. § 240.21F-2(b)(1). It states:

> (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:
>
> > (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;
> >
> > (ii) You provide that information *in a manner described in Section 21F(h)(1)(A) of the Exchange Act* (15 U.S.C. 78u-6(h)(1)(A)).

Id. (emphasis added).

In a release accompanying the final rule, the SEC explicitly stated, "the third category [section 78u-6(h)(1)(A)(iii)] includes individuals who report to persons or governmental authorities *other than the Commission*." Securities Whistleblower Incentives and Protections, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34300-01, at *34304 (June 13, 2011) (emphasis in original) ("Specifically, Section 21F(h)(1)(A)(iii) . . . incorporate[s] the anti-retaliation protections specified in Section 806 of the Sarbanes-Oxley Act . . . .").

DISCUSSION

Union Allied asserts that Page cannot demonstrate that she was a "whistleblower" as defined by the Dodd–Frank Act because she did not make protected disclosures to the SEC. Rather, Page merely alleged retaliation for her internal disclosures to her supervisor. Union Allied argues that, under a plain reading of the statute, the anti-retaliation provision does not cover the disclosures made by Page.

Page counters that her internal report to her supervisor regarding conduct that she reasonably believed violated securities laws constituted protected conduct under Section 806 of the Sarbanes–Oxley Act, 18 U.S.C. § 1514A, and, consequently, protected conduct under section 78u-6(h)(1)(A)(iii) of Dodd–Frank. Page argues that this Court should defer to the SEC's broader rule.

Circuit courts are currently split on this question. The Fifth Circuit has held that the Dodd–Frank Act unambiguously indicates that whistleblower protection applies exclusively to individuals who have reported potential securities violations to the SEC. *See Asadi v. G.E. Energy U.S., LLC*, 720 F.3d 620, 629 (5th Cir. 2013) ("Based on our examination of the plain language and structure of the whistleblower-protection provision, we conclude that the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws *to the SEC* to qualify for protection from retaliation under *§ 78u-6(h)*." (emphasis in original)). According to this view, no conflict exists between the statute's definition of a "whistleblower" and the categories of protected activity identified in section 78u-6(h)(1)(A) of the statute. *See id.* at 627 (finding that "§ 78u-6(h)(1)(A) does not provide alternative definitions of the term 'whistleblower' for purposes of the whistleblower-protection provision"). A growing minority of district courts have reached the same conclusion. *See, e.g.*, *Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 664–65 (E.D. Va. 2015) ("[T]he statute directly and unambiguously limits whistleblower protection to individuals who report to the SEC . . . ."); *Verble v. Morgan Stanley Smith Barney, LLC*, No. 3:15-CV-74-TAV-CCS, 2015 U.S. Dist. LEXIS 164495, at **27 (E.D. Tenn. Dec. 8, 2015) ("Because plaintiff did not provide information to the SEC before his termination, he does not qualify as a whistleblower as defined in Dodd-Frank and has no protection under § 78u-6(h)(1)(A)."); *Verfuerth v. Orion Energy Sys.*, No. 14-C-352, 2014 U.S. Dist. LEXIS 156620, at *11 (E.D. Wis. November 4, 2014) ("Because Plaintiff concedes he

does not qualify as a whistleblower, as defined in the Act, the motion to dismiss the Dodd-Frank claim will therefore be granted."); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 U.S. Dist. LEXIS 101297, at *12 (D. Colo. July 19, 2013) ("Ms. Wagner did not provide any information to the Commission, whether relating to a violation of the securities laws or otherwise, prior to her termination. Accordingly, she was not a 'whistleblower' as defined in this statute."); *Banko v. Apple Inc., LLC*, 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013) ("Because plaintiff did not file a complaint to the SEC, he is not a 'whistleblower' under the Dodd-Frank Act.").

The Second Circuit, on the other hand, has held that Dodd–Frank's whistleblower-protection provision is ambiguous and has deferred to the SEC's interpretation of the statute. *See Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 U.S. App. LEXIS 16071, at *26–28 (2d Cir. Sept. 10, 2015) ("[T]he tension between the definition in subsection 21F(a)(6) and the limited protection provided by subdivision (iii) of subsection 21F(h)(1)(A) if it is subject to that definition renders section 21F as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the [SEC]."). The Second Circuit accurately characterized its decision as creating a circuit split "against a landscape of existing disagreement" among a majority of district courts. *Id.* at *22; *see, e.g.*, *Dressler v. Lime Energy*, No 3:14-cv-07060 (FLW)(DEA), 2015 U.S. Dist. LEXIS 106532, at *43 (D.N.J. Aug. 13, 2015); *Somers v. Digital Realty Trust, Inc.*, No. C-14-5180 EMC, 2015 U.S. Dist. LEXIS 64178, at *2 (N.D. Cal. May 15, 2015); *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 U.S. Dist. LEXIS 153439, at *16 (N.D. Cal. Oct. 28, 2014); *Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. May 8, 2014); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Murray v. UBS Secs., LLC*, No. 12-5914, 2013 U.S. Dist. LEXIS 71945, at *21 (S.D.N.Y. May 21, 2013).

In *Chevron*, the Supreme Court established a two-step framework for reviewing an administrative agency's interpretation of a statute. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (directing courts to first determine "whether Congress has directly spoken to the precise question at issue" and second, if "the statute is silent or ambiguous," to determine whether the agency's interpretation is "based on a permissible construction of the statute."). Under Step One of *Chevron*, the Court must begin by determining whether the anti-retaliation provision of the Dodd–Frank Act is ambiguous. Our inquiry starts with the text of the statute. *See, e.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there." (internal citations and quotations omitted)).

The plain language of the definitional provision clearly restricts the meaning of a "whistleblower" to an individual who makes a report of potential securities violations "to the Commission." 15 U.S.C. § 78u-6(a)(6). The question before us is

therefore whether Congress was equally clear in expressing an intent to apply this definition to section 78u-6(h)(1)(A)(iii).

Comparing the wording of sections 78u-6(h)(1)(A)(i) and (ii) to that of section 78u-6(h)(1)(A)(iii) weighs in favor of finding ambiguity. *See Dressler*, 2015 U.S. Dist. LEXIS 106532, at *30–32. Both subsections (i) and (ii) refer explicitly to disclosures or activities directed towards the SEC, whereas subsection (iii) makes no reference to the SEC whatsoever. *Cf.* 15 U.S.C. § 78u-6(h)(1)(A)(i) *and* § 78u-6(h)(1)(A)(ii) *with* § 78u-6(h)(1)(A)(iii). The omission of any reference to the SEC in subsection (iii) "indicates that Congress may have intended different meanings with respect *to whom* an individual must report securities violations." *Dressler,* 2015 U.S. Dist. LEXIS 106532, at *31 (emphasis in original). The Supreme Court has held that "certain language in one part of the statute and different language in another" can show that "different meanings were intended." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711, n.9 (2004)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (brackets in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720,722 (1972)). While the "negative implication" canon, like other canons of interpretation, is "no more than a rule of thumb," it can be used to "tip the scales when a statute could be read in multiple ways." *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1620 (2014) (quoting *Sebelius,* 133 S. Ct. at 825).

Turning to another traditional canon of statutory construction, the surplusage canon instructs that courts should interpret statutory language such that, "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). As it happens, both parties maintain that their respective readings avoid surplusage. Union Allied argues that the Fifth Circuit's interpretation of the term "whistleblower" in *Asadi* correctly avoids ignoring three words—"to the Commission"—which appear in the statutory definition. Page contends that imposing a requirement to report to the SEC would render section 78u-6(h)(1)(A)(iii), which protects disclosures "required or protected under the Sarbanes–Oxley Act," superfluous, as that sections 78u-6(h)(1)(A)(i) and (ii) already offer protection to whistleblowers who disclose directly to the SEC. Page therefore argues that section 78u-6(h)(1)(A)(iii) must contemplate a broader scope of protection, indicating a conflict between the definitional section and anti-retaliation provision. A majority of district courts have agreed with this reasoning. *See, e.g.*, *Somers*, 2015 U.S. Dist. LEXIS 64178, at *30 ("In light of these examples, Section 21F(a)(6)'s narrow definition of whistleblower cannot easily be reconciled with Section 21F(h)(1)(A)(iii)' s seemingly expansive scope, which appears to cover conduct under statutes that expressly *require* internal whistleblowing activity to occur be-

fore an individual may even consider making a voluntary report to the SEC." (emphasis in original)).

In response to these concerns, the Fifth Circuit has found, as noted by the District of Hell's Kitchen, that there is a way to read both provisions consistently:

> [A]n individual who makes simultaneous reports to his own company and to the SEC may be fired before his company becomes aware of the SEC disclosure. This individual would qualify as a "whistleblower" as defined in section 78u-6(a)(6), but because he could not prove that he was retaliated against for his report to the SEC, he would not be protected by sections 78u-6(h)(1)(A)(i) or (ii). He would, however, be protected against retaliation by section 78u-6(h)(1)(A)(iii); this category of protected activity is not made superfluous by observing the SEC notification requirement.

Page v. Union Allied Corp., No. 29-9620, 2015 WEXIS 458729, at *5 (D.H.K. December 1, 2015) (citing *Asadi*, 720 F.3d at 627–628). Although this hypothetical avoids the surplusage problem, it does so only by significantly restricting the scope of section 78u-6(h)(1)(A)(iii) and causing a new set of inconsistencies, which the Second Circuit addresses. *See Berman*, 2015 U.S. App. LEXIS 16071, at *17–18. First, only a small number of employees are likely to report wrongdoing both internally and to the SEC. Perceiving that reporting to an agency creates a higher risk of retaliation, many individuals will report violations only to their employers. *See id.* at *16. Second, and more tellingly, certain categories of whistleblowers, including attorneys and auditors, may not in fact report wrongdoing to the SEC until they have reported internally first. *See id.* at *16–17.

Auditors, for example, are subject to section 205 of Sarbanes–Oxley, which is implicitly cross-referenced by section 78u-6(h)(1)(A)(iii) of Dodd–Frank. Section 205 amends section 78j-1 of the Exchange Act, which lays out audit requirements. 15 U.S.C. § 78j-1. Section 78j-1(b)(1)(B) requires an auditor of a public company to "inform the appropriate level of the management" of information likely relating to consequential illegal acts. *See* 15 U.S.C. § 78j-1(b)(1)(B). Section 78j-1(b)(2) requires an auditor to "directly report its conclusions to the board of directors" if senior management has not taken appropriate remedial actions regarding the reported illegal act. *See* 15 U.S.C. § 78j-1(b)(2). Finally, section 78j-1(b)(3)(B) permits an auditor to furnish a report to the SEC only if the board fails to take appropriate remedial action. *See* 15 U.S.C. § 78j-1(b)(3)(B). If section 78u-6(h)(1)(A)(iii) of Dodd–Frank were to require reporting to the SEC, its reference to the provisions of Sarbanes-Oxley would afford an auditor little to no Dodd–Frank protection for retaliation because the auditor must wait for a company response to an internal report before reporting to the SEC, and any retaliation would almost always occur prior to SEC reporting. *Berman*, 2015 U.S. App. LEXIS 16071, at *17; *see also Dressler*, 2015 U.S. Dist. LEXIS 106532, at *28 ("Under that interpretation, in which only a small fraction of

actions taken under 78j-1 would be consistent with the Section 78u-6(a)(6) 'whistleblower' definition, 'nearly all of the conduct "required" under [S]ection 78j-1 and its scheme of internal reports would be undermined.'" (quoting *Somers*, 2015 U.S. Dist. LEXIS 64178, at *9)).

In addition, section 78u-6(h)(1)(A)(iii) of Dodd–Frank explicitly references disclosures that are required or protected under section 78j-1(m) of the Exchange Act. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (specifically protecting disclosures made under "this chapter, including section 78j-1(m) of this title"). Section 78j-1(m), titled "Standard relating to audit committees," protects reports made to the audit committee, and does not require or discuss in any way disclosure to the SEC. *See* 15 U.S.C. § 78j-1(m); *see also Dressler*, 2015 U.S. Dist. LEXIS 106532, at *29 ("This Court finds that the exclusion of any SEC reporting requirement in Section 78j-1(m) to be an even stronger point of tension between the provisions, thereby weighing in favor of finding ambiguity in the statute as a whole.").

Taken together, these multiple inconsistencies lead us to the conclusion that the whistleblower-protection program of Dodd–Frank is ambiguous. The Fifth Circuit's proposed reading at best indicates that multiple readings of the statutory language are possible. *See Connolly*, 2014 U.S. Dist. LEXIS 153439, at *17 ("Notwithstanding the *Asadi* Court's efforts to reconcile these sections, these portions of Dodd-Frank are—at minimum—susceptible to more than one interpretation when read together.").

We must therefore proceed to Step Two of *Chevron*. 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). We are tasked with determining whether SEC Rule 21F, which concludes that anti-retaliation provisions afforded by the statute apply to individuals who report only internally, constitutes a reasonable and permissible interpretation of the Dodd–Frank Act. The majority of courts to consider the reasonableness of the SEC rule in the context of *Chevron* have concluded that the interpretation is permissible. These courts have found that the SEC rule provides greater clarity, remedying the inconsistency between the conflicting provisions. *See Dressler*, 2015 U.S. Dist. LEXIS 106532, at *41 ("[T]he interpretation reasonably clarifies how individuals can make an anti-retaliation claim for the broad spectrum of protected activities under Subsection (iii) in the face of the narrow 'whistleblower' definition. In doing so, the Rule 21F-2(b)(1) reasonably construes the statute 'in light of principles of construction that courts normally employ.'" (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 272 (2010))); *Somers*, 2015 U.S. Dist. LEXIS 64178, at *39 ("[T]he SEC's interpretation is reasonable because it effectively eliminates the tension between the narrow definition of whistleblower in Section 21F(a)(6) and the seemingly very broad coverage of subsection (iii)."). Furthermore, courts have found that the SEC's interpretation advances the goals of the whistle-

blower program, which was intended to encourage the reporting of wrongdoing. *See Dressler*, 2015 U.S. Dist. LEXIS 106532, at *41 ("[T]he interpretation is reasonable in light of the many policy considerations of the Dodd—Frank Act and whistleblower protection generally, including incentives for reporting illegal activities and encouraging internal reporting."); *Connolly*, 2014 U.S. Dist. LEXIS 153439, at *17 ("The SEC's interpretation is a reasonable position that most other courts have adopted and that comports with Dodd-Frank's scheme to incentivize broader reporting of illegal activities."). We agree, for the reasons stated by the district courts, that the SEC interpretation is a reasonable one, to which we give deference pursuant to *Chevron*.

CONCLUSION

Under SEC Rule 21F-2(b)(1), Page is entitled to pursue Dodd–Frank remedies for alleged retaliation after her report of wrongdoing to her supervisor, although she did not make a report to the SEC prior to her termination. We reverse.

SUPREME COURT
OF THE UNITED STATES

Union Allied Corporation, Petitioner,	:	
-against-	:	ORDER GRANTING CERTIORARI
Karen Page, Respondent.	:	

PER CURIAM:

An application having been made for certiorari from the judgment entered by the Court of Appeals for the Fourteenth Circuit, dated February 10, 2016, it is hereby:

ORDERED, that said application for certiorari be GRANTED and that the following issue be certified for argument in this Court:

> Whether an individual who reports securities violations internally, but not to the SEC, is entitled to the anti-retaliation whistleblower protections provided by the Dodd–Frank Act.

/s/_____
Elektra Natchios
Clerk
Supreme Court of the
United States of America

Dated: October 13, 2016