16-946
No.

In The Supreme Court of the United States

JOHN S. VERBLE,

Petitioner,

v.

MORGAN STANLEY SMITH BARNEY, LLC; MORGAN STANLEY & COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in misapplying *Twombly* and *Iqbal* in such a way as to avoid deciding the issue which had been decided by the District Court and on which the appeal to the 6th Circuit was based, namely whether the 5th Circuit holding under *Asadi* rejecting the SEC Rule on whistleblowers under the Dodd Frank Act or the 2d Circuit holding under *Berman* accepting and applying the SEC Rule on "whistleblowers" is the correct interpretation of the law.

II. Which of two conflicting rules, one by the 5th Circuit and the other by the 2nd Circuit, should govern whistleblowers under the Dodd Frank Act. In *Asadi v. G.E. Energy*, the 5th Circuit ruled that in order for a person to qualify as a "whistleblower" under Dodd-Frank, he or she must have made a complaint to the SEC before termination. In *Berman v. Neo@Ogilvy LLC*, the 2d Circuit ruled that Congress had given rule making authority to the SEC and, therefore, the SEC rule, 17 C.F.R. § 240.21F-2, applies so that a person may qualify as a "whistleblower" if he or she reports wrongdoing to his or her employer or to any law enforcement agency, including the FBI.

III. Whether the Circuit Court erred in determining that the Plaintiff had failed to allege sufficient facts to state a case

for whistleblower protection under the Dodd Frank Act when that issue had been decided in Plaintiff's favor by the district court, had not been assigned as error by the Appellee, and had not been briefed by the parties.

IV. Whether the SEC was within its statutory rule making power when it promulgated 17 C.F.R. § 240.21F–2, which provides that a person is a "whistleblower" entitled to Dodd-Frank Act protection from retaliation if he or she reports a crime subject to the jurisdiction of the commission or any wrongdoing enumerated in § 78u-6(h)(1)(A) to any law enforcement official.

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Memorandum Opinion and Order of the U. S Court of Appeals for the Sixth Circuit dated 13 January 2017 dismissing Petitioner's appeal and affirming the District Court based on grounds of *Iqbal* and *Twonbley* pleading technicalities – an issue not raised by appellee, briefed by the parties, or argued in the Circuit Court.

JURISDICTION

Petitioner seeks review of a final order of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 *U.S.C.* §1257 and Rule 13 of the *Rules of the Supreme Court of the United States* because the petition is filed within 90 days of the decision by the Circuit Court.

STATUTORY PROVISIONS, RULES OF CIVIL PROCEDURE AND S.E.C. RULES

15 U.S.C. § 78u-6(a)(6):

> **(6)** Whistleblower. The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, 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. §78u6(h)(1)(A)

h) Protection of whistleblowers.

- **(1)** Prohibition against retaliation.
  - **(A)** In general. 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--
    - **(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.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), **section 1513(e) of title 18, United States Code**, and any other law, rule, or

> regulation subject to the jurisdiction of the Commission.

[emphasis added.]

Rule 8(a), *Fed. Rules of Civil Procedure*:

(a) *CLAIM FOR RELIEF.* A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

17 CFR 240.21F-2:

> **(b)** Prohibition against retaliation: (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)).

- **(iii)** The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.
    - **(2)** Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

[emphasis added]

18 U.S.C.S. § 1514A:

> **(a)** Whistleblower protection for employees of publicly traded companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such

company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

- **(1)** to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [18 USCS § 1341, 1343, 1344, or 1348], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
    - **(A)** a Federal regulatory or law enforcement agency;
    - **(B)** any Member of Congress or any committee of Congress; or
    - **(C)** a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

- **(2)** to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348 [18 USCS § 1341, 1343, 1344, or 1348], any rule or

regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. 1513(e):

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

1. Procedural History

Plaintiff filed a complaint in the District Court for the Eastern District of Tennessee in Knoxville, Judge Thomas Varlan presiding, on 19 February 2015, alleging that Plaintiff stockbroker was wrongfully discharged by Defendant Morgan Stanley Smith Barney brokerage firm in violation of the Sarbanes-Oxley Act, the Dodd-Frank Act, the Federal False Claims Act, and Tennessee State law. The Complaint further alleged that Defendants were guilty of slander and were liable for personal injuries to Plaintiff for the physical and emotional distress caused by the acts alleged in the Complaint. [Plaintiff's Complaint 1-20]

On 12 March 2015, Defendants filed a motion to dismiss; Plaintiff responded to Defendants'

Motion; Defendants filed a reply; the SEC filed an *amicus* brief on behalf of the Commission in support of Plaintiff's position; Defendant responded; the SEC filed four notices of supplemental authority; and Defendants responded to each one. The trial court entered a scheduling order, but one week later, on 8 December 2015, the trial court entered a memorandum opinion and order dismissing all of Plaintiff's claims and ordering the case closed on the grounds that Plaintiff had failed to complain to the SEC before he was discharged. The district court's decision was based on the 5th Circuit's interpretation of the Dodd Frank Act in the *Asadi* case. Plaintiff appealed the Court's ruling that a whistleblower must complain to the SEC about a violation before his or her discharge to qualify for protection under Dodd-Frank. That issue of law was the only issue briefed and argued on appeal in the Sixth Circuit.

2. Facts

According to Plaintiff's Complaint, Plaintiff began working at Morgan Stanley Smith Barney ("MSSB") in 2006. Over the next several years Plaintiff, through his employment, observed a pattern of illegal and unlawful activities. Plaintiff became privy to knowledge that: (1) his colleagues and management of MSSB were engaging in insider trading; (2) his colleagues and management of MSSB knew about, condoned and assisted in their clients' perpetration of fraud upon the public; and, MSSB clients, particularly Pilot Flying J, committed fraud on the both private trucking companies and the United States government with MSSB's knowledge.

Plaintiff contacted the FBI regarding the information he obtained through his employment, and Plaintiff agreed to work with the FBI by wearing a wire during conversations with persons discussing or committing illegal acts.

While Plaintiff was employed by MSSB, he assisted the FBI in their investigation of the various illegal activities Plaintiff had discovered, and as a result of Plaintiff's cooperation with the FBI, a scheme involving Pilot Flying J employees' defrauding truckers of their fuel rebates was discovered. This scheme was revealed to the public in April, 2013, but what was not revealed is that one of Pilot Flying J's largest customers is the U.S. Government, which buys hundreds of thousands of gallons of diesel fuel periodically for use by the postal service, and that the U.S. Government was defrauded of its rebates in the same fashion as private trucking companies.

Although, unfortunately, the Complaint did not specifically make the point, counsel mistakenly assumed that the District Court would take notice that the FBI routinely coordinates with the SEC when any issue of securities fraud is presented to them. And, indeed, the FBI did coordinate with the SEC as is indicated by the *Touhy* letter (included in the Appendix) sent by authority of Edward Rhinehold, Special Agent In Charge, to undersigned counsel on 16 July 2015—long after all briefing on the motion to dismiss had been completed.

Defendants began to suspect that Plaintiff was cooperating with authorities in November of

2012, when a colleague of Plaintiff observed Plaintiff interacting with FBI agents. In March of 2013, these suspicions were strengthened when the same colleague again observed interaction between Plaintiff and FBI agents. In April of 2013, when the Pilot Flying-J scandal was revealed to the public, the Defendants' suspicions were confirmed due to the nature of the information given to the authorities by Confidential Informant No. 1. To confirm their fears, Defendants questioned Plaintiff on 7 May 2013 regarding his possible cooperation with the Government. During that questioning, Defendants asked Plaintiff whether he was wearing a wire. Thereafter, a heated exchange took place that culminated in Plaintiff's leaving the room after Defendant MSSB's branch manager made a physical threat, to-wit "I'm going to take you outside and whip your ass." The next day, Defendants placed Plaintiff on administrative leave, and on 17 June 2013, Defendant MSSB fired Plaintiff.

After being fired, Plaintiff sought other work in his field as a financial adviser. He quickly discovered that MSSB employees had contacted his clients and informed them that he was "crazy," "unstable," "had left the field," and a number of other false and damaging allegations. Plaintiff further discovered that Defendants provided defamatory information to potential employers. Defendants have continued to slander Plaintiff since his discharge.

ARGUMENT

1. Overview

There is a conflict between the 5th Circuit and the 2nd Circuit concerning the statutory requirements for qualifying as a "whistleblower" under the Dodd-Frank Act. In *Asadi v. G.E. Energy (USA) LLC*, 720 F. 3d 620 (5th Cir., 2013), the 5th Circuit ruled that in order for a person to qualify as a "whistleblower" under Dodd-Frank, that person must have made a complaint to the SEC before termination. However, in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), the 2nd Circuit ruled that Congress has given rule making authority to the SEC and, therefore, the SEC rule, 17 C.F.R. § 240.21F-2, applies so that a person may qualify as a "whistleblower" under Dodd Frank if he or she reports wrongdoing to his or her employer or to any law enforcement agency, including the FBI.

In this case, the Plaintiff observed wrongdoing in violation of the Sarbanes Oxley Act and Dodd Frank Act at Defendant Morgan Stanley Smith Barney beginning in or about 2012 and brought such wrongdoing to the attention of the FBI. Plaintiff cooperated with the FBI for roughly two years in developing evidence, and did such things as wear a wire. However, Plaintiff did not report directly to the SEC, although the FBI reported Plaintiff's disclosures to the SEC before Plaintiff was fired. Plaintiff was fired because of his work with the FBI, and under the 2nd Circuit's view of the law, Plaintiff is entitled to Dodd Frank whistleblower protection.

2. Reasons for Granting the Writ

1. There is currently a conflict between the circuits concerning whether the *Asadi* case in the 5th Circuit should control eligibility for whistleblower protections under the Dodd Frank Act, or whether the *Berman* case from the 2nd Circuit applying the SEC Rule 17 C.F.R. § 240.21F-2 should control.

2. The SEC filed amicus briefs in both the District Court and the Sixth Circuit urging that both courts recognize the legitimacy of the SEC Rule and apply that rule to Mr. Verble's case and future whistleblower cases under Dodd Frank.

3. When the *Berman* court decided the Dodd Frank issue against the financial industry, the industry did not appeal because the *Asadi* case creates ambiguity that allows the financial industry to escape liability or settle cheaply. Mr. Verble's case allows this Court to resolve the conflict among the circuits created by *Asadi* and *Berman*--- an opportunity unlikely to present itself again so long as cases settle or the occasional circuit court follows *Berman*.

4. This case clearly raises a major issue of public policy concerning the application and enforcement of the Dodd Frank Act because the 5th Circuit's interpretation of the Dodd Frank whistleblower provision guts the protections that Congress obviously intended and discourages employees from reporting wrongdoing internally, as pointed out by the SEC in its *amicus* briefs. However, whistleblower victims are entitled to a final

resolution of the *Asadi/Berman* conflict by this Court.

5. The SEC rule combined with the interpretation of the Dodd Frank Act by the *Berman* court in the 2nd Circuit restores the protections that Congress obviously intended and that the 5th Circuit's *Asadi* case took away.

6. It is a travesty of justice for the Sixth Circuit to dismiss Plaintiff's case based on procedural legerdemain when the issue of the sufficiency of the pleadings was not an issue on which the district court decided the case below, and when the sufficiency of the pleadings issue had not been raised by the Appellee (which would have allowed the Appellant to respond) or briefed either by the parties or by the *amicus* SEC.

3. The Circuit Court Disingenuously Ducked the Issue Elaborately Briefed and Argued Because Developing the Merits of This Case will Embarrass Prominent Persons in Knoxville and Cleveland.

Undersigned counsel served 22 years as either a justice or chief justice of the West Virginia Supreme Court of Appeals. In the course of that service, counsel wrote seven books about the economics and sociology of law, including *How Courts Govern America* (Yale U. Press, 1980). Therefore, counsel is well aware that courts, like baseball umpires, are required to call the equivalent of "balls and strikes" under circumstances when, like

umpires, they make the wrong call based on flawed perceptions.

However, there is a big difference between mistakenly calling a ball a strike or *vice versa* and ruling that the strike zone extends from the neck to three inches above the head. This case so perverts the tradition of Rule 8(a) *Fed. R. Civ. Pro.* that counsel can infer only that there was a strong political reason for the Circuit Court to attempt to deny a virtually automatic appeal to this Court on the whistleblower issue through procedural legerdemain.

This case implicates a company known as "Pilot Flying J," which is headquartered in Knoxville, Tennessee. Pilot Flying J is the largest operator of travel centers and travel plazas in North America with more than 650 locations throughout the United States and Canada and more than 24,000 employees. And, as the No. 1 seller of over-the-road diesel fuel in the nation, Pilot Flying J is ranked No. 7 among America's Largest Private Companies by Forbes.

At the time Petitioner wore a wire for the FBI and uncovered massive fraud at Pilot Flying J, the president of Pilot Flying J was James "Jimmy" Haslam, perhaps Knoxville's most prominent citizen and philanthropist, owner of the Cleveland Browns[1] football team, and the brother of William "Bill"

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[1] All three judges on the Sixth Circuit Panel live in Cleveland or neighboring Akron, and the appeal was heard in the local Cleveland district courthouse.

Haslam, the then governor of Tennessee and the richest person in American politics until the arrival of Donald Trump.

The district court never suggested that there was any pleading failure in Petitioner's articulation of his case for retaliatory discharge under the Dodd-Frank Act; rather, the district court chose to adopt the reasoning of the 5th Circuit in *Asadi* and dismiss Petitioner's complaint because Petitioner had not presented his information to the SEC before Petitioner was fired.

The circuit court panel, however, dismissed Petitioner's case based on an issue that was never raised below, namely the sufficiency of the pleading of the Dodd Frank retaliation count. Given that the Appellee had not raised that issue, and given that Petitioner had no opportunity to meet the allegation that his pleading on the Dodd Frank count was insufficient, the circuit court's ruling was so obviously inappropriate that experienced judges can detect an unspoken hidden agenda on the part of the circuit panel. Regretfully, full development of Petitioner's case in the district court would inevitably involve development of the facts about Pilot Flying J that Petitioner revealed to the FBI and that caused Petitioner to be fired by Morgan Stanley. The owners of Pilot Flying J are among the Sixth Circuit's most prominent citizens.

The following examples from Petitioner's original complaint show conclusively that the circuit court intentionally did not follow Rule 8(a), *Fed. R.*

Civ. Pro., even when the *Iqbal* and *Twombly*[2] gloss is liberally accounted for:

> 11. Between November, 2006 and March, 2010 Plaintiff became aware of numerous criminal activities on the part of clients of MSSB as well as questionable activities that violated the Sarbanes Oxley Act and other federal statutes on the part of MSSB itself, which activities were of a serious nature and which activities caused Plaintiff high anxiety and a great moral concern.
>
> 12. The criminal activities observed by Plaintiff involved, without limitation: (1) fraud upon the government of the United States; (2) fraud upon the people of the United States; (3) fraud and wrongdoing in the securities industry; and, (4) fraud and wrongdoing in publicly traded companies.
>
> 13. In or about November, 2012 and again in or about March, 2013 Brian Massengill, a colleague of Plaintiff at Morgan Stanley, observed Plaintiff getting into a black sedan with tinted windows accompanied by what appeared to be Federal agents. Mr. Massengill asked Plaintiff in November, 2012 whether he was working with the FBI and Plaintiff averred to Mr. Massengill that he was working with the staff of Congressman John Duncan.

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[2] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)

14. As a result of the newspaper stories and the second sighting by Mr. Massengill of Plaintiff in the black sedan with apparent FBI agents, on or about 7 May 2013, executives at MSSB called Plaintiff into a conference room where four other MSSB persons were present, including a lawyer from Defendant Morgan Stanley & Co., Inc., namely Daniel Derechin, Esq., vice president of legal and compliance, and thereupon Mr. Derechin asked Plaintiff a series of questions concerning whether Plaintiff was cooperating with the FBI.

15. Among other questions, Plaintiff was asked whether he "was wearing a wire" in the conference room at the time of the interview, and was further questioned about any and all relationships he had with the FBI.

16. Plaintiff did not discuss any details of his involvement in any investigation or prosecution, but Plaintiff's evasive answers to the Defendants' questioning clearly signaled to the MSSB and Morgan Stanley management personnel in the room that he was working with Federal and/or State authorities.

17. Because it became apparent that Plaintiff was working with the FBI, the branch manager, David Elias, told Plaintiff "I am going to take you outside and whip your ass!"

18. Plaintiff had been instructed by the FBI to avoid all physical confrontations, and pursuant to those instructions, upon being threatened, Plaintiff got up and left the conference room.

25. In the course of the FBI investigation into numerous related illegal activities, Plaintiff wore a wire and uncovered insider trading activities at MSSB, all in violation of, without limitation, the Sarbanes Oxley Act, (15 U.S.C. 7201 et seq.).

26. In addition to Plaintiff's work with the FBI, Plaintiff has also worked closely with the Securities and Exchange Commission to uncover, without limitation, insider trading and Sarbanes Oxley Act violations.

27. Specifically, Plaintiff uncovered insider trading among members of MSSB's Knoxville office and their clients with regard to Miller Energy stock, all in violation of §10(b) of the Securities and Exchange Act of 1934 and Rule 10-b-5 (17 C.F.R. 240.10b-5) of the implementing regulation, all of which constituted fraud in a publicly traded company.

28. Plaintiff also discovered manipulation of the books of Miller Energy, including by way of example, the Company's borrowing money without disclosing said loan to stockholders or the SEC.

> 29. Management of MSSB suspected that Plaintiff was also involved in relating information concerning insider trading on the part of MSSB personnel and MSSB personnel's complicity with employees of other publicly traded companies misrepresenting financial information to Federal regulators and manipulating stock prices. Thus, Plaintiff's firing was a violation of 15 USCS § 78u-6(h) and 18 U.S.C. §1514A.

The cynosure of Petitioner's claim is that Morgan Stanley retaliated against him because of his cooperation with the FBI in uncovering fraud on the part of Pilot Flying J and insider trading with regard to Miller Energy. The other issues, such as the false claims act count and the passing reference to Sarbanes Oxley[3] are insignificant compared to the issue that was fully briefed both by Petitioner and by the SEC.

The central holding of the circuit court's opinion is on page 9 of the opinion where the Court says:

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[3] The statutes and rules governing whistleblowing are extremely convoluted and confusing. However, the Dodd Frank Act strengthened the protections for whistleblowers that are found in the Sarbanes Oxley Act. Thus, the Dodd Frank Act refers to the substantive provisions of the Sarbanes Oxley Act, particularly with regard to various required disclosures in public companies, which means that Dodd Frank provides additional protections beyond those afforded by the Sarbanes Oxley Act itself for those who disclose violations of Sarbanes Oxley.

> Verble's complaint alleges that he was "retaliate[ed] against ... for his legitimate cooperation with Federal law enforcement authorities, including by way of example the FBI and SEC." The complaint provides no factual information about his cooperation with the SEC or FBI....Verble never rescinded the argument that he worked directly with the FBI, but he also did not provide any factual information about his work with the FBI. He says that he "uncovered insider trading activities at MSSB," for example, "insider trading among members of MSSB's Knoxville office and their clients with regard to Miller Energy Stock," but provided no details."

This holding makes no sense because Petitioner alleged in Paragraph 25 that: "In the course of the FBI investigation into numerous related illegal activities, **Plaintiff wore a wire** and uncovered insider trading activities at MSSB, all in violation of, without limitation, the Sarbanes Oxley Act, (15 U.S.C. 7201 et seq.)." This is a very specific factual allegation: Anyone who wears a wire for the FBI is obviously involved as a confidential informant.

Then in Paragraph 27 of Petitioner's Complaint, Petitioner alleged that he uncovered "insider trading" in Miller Energy stock. What constitutes "insider trading" has been explained in countless U.S. Supreme Court and circuit court opinions in the past twenty-five years, so when one alleges that he or she uncovered "insider trading," what is meant is that he or she uncovered that various persons were buying and selling stock based

on undisclosed, material information with regard to the publicly traded company in whose stock those persons were trading.

In Paragraph 28 of his Complaint, quoted *supra*, Petitioner pled that he "discovered manipulation of the books of Miller Energy, including by way of example, the Company's borrowing money without disclosing said loan to stockholders or the SEC." That is a very specific allegation and is easily proved or disproved in discovery.[4]

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[4] On 6 August 2015, while the Defendants' Motion to Dismiss was pending in the District Court, the SEC issued the following press release with regard to Miller Energy:

Washington D.C., Aug. 6, 2015 —

The Securities and Exchange Commission today announced charges alleging that Miller Energy Resources Inc., its former chief financial officer, and its current chief operating officer inflated values of oil and gas properties, resulting in fraudulent financial reports for the Tennessee-based company. The audit team leader at the company's former independent auditor also was charged in the matter.

In an order instituting administrative proceedings, the SEC's Division of Enforcement alleges that after acquiring oil and gas properties in Alaska in late 2009, Miller Energy overstated their value by more than $400 million, boosting the company's net income and total assets. The allegedly inflated valuation had a significant impact, turning a penny-stock company into one that eventually listed on the New York Stock Exchange, where its stock reached a 2013 high of nearly $9 per share.

Both the FBI and the Department of Justice are notoriously reluctant to testify in civil cases or to assist civil litigants even, apparently, when those litigants have been helpful to law enforcement. Therefore, assembling concrete proof relating to FBI investigations at the pleading stage (before an opportunity for formal discovery) is difficult in cases involving either the FBI or Department of Justice. However, in the Appendix to this brief is the "*Touhey*" letter dated 16 July 2015 from the FBI testifying that, indeed, Petitioner's allegation that he wore a wire and assisted in the FBI's investigation is completely accurate.

Even the conservative *Iqbal* case holds: "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. In this case, the Petitioner alleged in paragraph 17, "[b]ecause it became apparent that Plaintiff was working with the FBI, the branch manager, David Elias, told Plaintiff "I am going to take you outside and whip your ass!" A threatened ass whipping is a very specific factual allegation!

CONCLUSION

In addition to the obvious value to the bench and bar of having this honorable Court resolve the conflict among the circuits arising from the contradictory holdings in the *Asadi* and *Berman* cases, failure by this Court to correct the obvious injustice to John Verble of the circuit court's unjustified dismissal would be a monument to why

an ordinary citizen is a complete fool ever to "do the right thing," particularly when "doing the right thing" implicates holding accountable persons of vast wealth and surpassing political power.

John Verble was a successful stockbroker and financial adviser in 2012 when he first started cooperating with the FBI; annually he was making roughly $359,859 plus health insurance benefits and approximately $11,000 in 401(k) contributions. However, because of his proximity to other Morgan Stanley brokers, executives with Pilot Flying J and executives with Miller Energy, Mr. Verble observed substantial illegal and unethical conduct that greatly offended his sense of right and wrong.

Instead of hunkering down and minding his own business, Mr. Verble approached the FBI with this information and then acquiesced in serving as a confidential informant which, among other things, involved wearing a wire and recording incriminating conversations.

As a direct result of Mr. Verble's activities, the prosecutions catalogued in the district court Complaint (paragraph 20) were initiated, resulting in at least 10 informations and guilty pleas as listed in Mr. Verble's Complaint. In addition, *U.S.A. Today* reported on 14 July 2014 that the Government collected roughly $92 million in civil penalties from Pilot Flying J arising from the same activities that led to the informations and guilty pleas listed in paragraph 20 of the Verble Complaint.

Rules 8(a)(2) and 8(a)(3) of the *Fed. R. Civ. Pro.* requiring "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought," which are unchanged from the Rules in 1938, are clear and unambiguous provisions central to the whole Federal Rules scheme of notice pleading. However, the recent glosses placed on these simple rules by *Bell Atlantic Corp. v. Twombly* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal* 556 U.S. 662 (2009) have played havoc with federal litigation in heartland America[5] because now virtually every case is challenged for lack of "factual" pleading. Although rarely do we see such an extreme perversion of *Twombly* and *Iqbal* as is presented by this case, nonetheless groundless motions to dismiss have greatly raised the cost for litigants and now routinely delay proceedings for at least six months from the date a complaint is filed.

Without the help of this Court, Mr. Verble will have lost his high-paying job with benefits, money that he invested with Morgan Stanley and that is currently being held hostage in his Morgan Stanley account, and ultimately, unless vindicated for his efforts as an honest citizen by a court, his good name.

Wherefore, Petitioner prays that this Honorable Court grant Petitioner a writ of certiorari

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[5] Those two cases also play havoc with state court litigation because many states, West Virginia among them, have patterned their procedural rules on the Federal Rules. When this Honorable Court places a gloss on one of the Federal Rules, it is only natural that the state courts that use identical rules will follow suit.

and afford him a decision on the merits of the issue on which the district court dismissed his Complaint, namely the legitimacy of the SEC rule interpreting the Dodd Frank Act.

Respectfully submitted,
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by Counsel

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