APPENDIX

APPENDIX CONTENTS

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE SECURITIES (USA) LLC; JPMORGAN CHASE & CO., a Delaware corporation, successor in interest to Hambrecht & Quist and Chase Securities Inc.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ONVIA INC., a Delaware corporation formerly known as Onvia.com Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35262 D.C. No. 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. DEUTSCHE BANK SECURITIES INC.; FOUNDRY NETWORKS INC., Nominal Defendant, a Delaware corporation; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; J.P. MORGAN SECURITIES INC., *Defendants-Appellees*. *IN RE: SECTION 16(B) LITIGATION*	No. 09-35280 D.C. Nos. 2:07-cv-01566-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MERRILL LYNCH & CO. INC., *Defendant,* and FINISAR CORPORATION, Nominal Defendant, a Delaware corporation; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; J.P. MORGAN SECURITIES INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35282 D.C. Nos. 2:07-cv-01567-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO., INCORPORATED; LEHMAN BROTHERS, INC.; BANK OF AMERICA CORPORATION; ROBERTSON STEPHENS, INC.; AVANEX CORPORATION, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35285 D.C. Nos. 2:07-cv-01568-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland formerly known as Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; TIVO INC., Nominal Defendant, a Delaware corporation; ROBERTSON STEPHENS, INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35286 D.C. Nos 2:07-cv-01576-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS & CO., a New York limited partnership; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS INC., a Massachusetts corporation, *Defendants-Appellees,* and TURNSTONE SYSTEMS, INC. a Delaware corporation, *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35288 D.C. Nos. 2:07-cv-01569-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS & CO., "Goldman Sachs"; CREDIT SUISSE SECURITIES (USA) LLC, "Credit Suisse" formerly known as Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; JUNIPER NETWORKS INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35289 D.C. Nos. 2:07-cv-01577-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO., INCORPORATED; DEUTSCHE BANK SECURITIES, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED; ARIBA INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35290 D.C. Nos. 2:07-cv-01570-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO., INCORPORATED; CITIGROUP GLOBAL MARKET, INC.; AKAMAI TECHNOLOGIES, INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35292 D.C. Nos. 2:07-cv-01571-JLR 2:07-cv-01549-JLR

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VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS GROUP INC., a Delaware corporation; JPMORGAN CHASE & CO., a Delaware corporation, successor in interest to Hambrecht & Quist LLC,
Defendants,
and
KANA SOFTWARE INC., Nominal Defendant, a Delaware corporation formerly known as Kana Communications Inc.; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

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No. 09-35293
D.C. Nos.
2:07-cv-01578-JLR
2:07-cv-01549-JLR

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VANESSA SIMMONDS,
Plaintiff-Appellant,

v.

MORGAN STANLEY, a Delaware corporation, successor in interest to Morgan Stanley Dean Witter,
Defendants,

and

SILICON LABORATORIES, INC., Nominal Defendant, a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; LEHMAN BROTHERS INC.; CITIGROUP GLOBAL MARKETS, INC.,
Defendants-Appellees.

JAMES W. GIDDENS, TRUSTEE FOR THE LIQUIDATION OF THE BUSINESS OF LEHMAN BROTHERS INC.,
Trustee-Appellee.

In Re: SECTION 16(b) LITIGATION

No. 09-35297
D.C. Nos.
2:07-cv-01590-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS GROUP INC., a Delaware corporation, *Defendants,* and BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; PALM INC., a Nominal Defendant, a Delaware corporation; GOLDMAN SACHS & CO.; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; ROBERTSON STEPHENS, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35300 D.C. Nos. 2:07-cv-01593-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS GROUP INC., *Defendants,* and BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; MAXYGEN INC., Nominal Defendant, a Delaware corporation; GOLDMAN SACHS & CO.,; ROBERTSON STEPHENS, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35301 D.C. Nos. 2:07-cv-01594-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland FKA Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; SILICON IMAGE, INC., Nominal Defendant, a Delaware corporation; ROBERTSON STEPHENS, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35302 D.C. No. 2:07-cv-01575-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS GROUP INC., a Delaware corporation, *Defendant,* and STREET.COM INC.; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35303 D.C. Nos. 2:07-cv-01595-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; CRITICAL PATH, INC., Nominal Defendant, a California corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35306 D.C. No. 2:07-cv-01582-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; CONCUR TECHNOLOGIES, INC., a Delaware corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES, INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35307 D.C. Nos. 2:07-cv-01585-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; SOURCEFORGE, INC., Nominal Defendant, a Delaware corporation, FKA VA Linux Systems, Inc.; LEHMAN BROTHERS, INC., *Defendants-Appellees*, JAMES W. GIDDENS, Trustee for the Liquidation of the Business of Lehman Brothers, Inc., *Trustee-Appellee*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35308 D.C. No. 2:07-cv-01583-JLR

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Plaintiff-Appellant,
v.
GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES, INC.; RED HAT, INC., a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION</td><td>No. 09-35309
D.C. Nos.
2:07-cv-01587-JLR
2:07-cv-01549-JLR</td></tr>
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Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; SELECTICA, INC., Nominal Defendant, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION</td><td>No. 09-35310
D.C. No.
2:07-cv-01584-JLR</td></tr>
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VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC., a Massachusetts corporation, *Defendants-Appellees*, and INTERWOVEN, INC., *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35312 D.C. Nos. 2:07-cv-01579-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC.; VIGNETTE CORPORATION, a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35313 D.C. Nos. 2:07-cv-01588-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC.; LEHMAN BROTHERS, INC.; SYCAMORE NETWORKS, INC., a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35314 D.C. Nos. 2:07-cv-01589-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC., a Delaware corporation, *Defendants-Appellees*, and OPENWAVE SYSTEMS, INC., a California corporation, *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35315 D.C. No. 2:07-cv-01580-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC. *Defendants-Appellees*, and INFORMATICA CORPORATION, a Delaware corporation, *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35316 D.C. Nos. 2:07-cv-01581-JLR 2:07-cv-01549-JLR

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VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC., a Massachusetts corporation; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, a Delaware corporation; CITIGROUP GLOBAL MARKETS INC., a New York corporation,
Defendants-Appellees,
and
INTERSIL CORPORATION, a Delaware corporation,
Defendant.
In Re: SECTION 16(b) LITIGATION

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No. 09-35317
D.C. Nos.
2:07-cv-01572-JLR
2:07-cv-01549-JLR

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VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS GROUP INC., *Defendant*, and BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson; Stephens, Inc.; SONUS NETWORKS INC., a Delaware corporation; GOLDMAN SACHS & CO.; LEHMAN BROTHERS INC.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees,* JAMES W. GIDDENS, TRUSTEE FOR THE LIQUIDATION OF THE BUSINESS OF LEHMAN BROTHERS INC. *Trustee-Appellee.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35318 D.C. Nos. 2:07-cv-01597-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC., a Delaware corporation; LEHMAN BROTHERS, INC., a Delaware corporation, *Defendants-Appellees,* and AVICI SYSTEMS, INC., a Delaware corporation, *Defendant.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35320 D.C. No. 2:07-cv-01573-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; PRICELINE.COM INC., a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; ROBERTSON STEPHENS, INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35321 D.C. Nos. 2:07-cv-01598-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS & CO.,; LEHMAN BROTHERS, INC.; J.P. MORGAN SECURITIES, INC.; MARVELL TECHNOLOGY GROUP, LTD., a Bermuda corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35322 D.C. Nos. 2:07-cv-01632-JLR 2:07-cv-01549-JLR

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<td>VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO., INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; PEROT SYSTEMS CORPORATION, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION</td>
<td>No. 09-35323
D.C. Nos.
2:07-cv-01631-JLR
2:07-cv-01549-JLR</td>
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VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; DEUTSCHE BANK AG, a global bank headquartered in Frankfurt, German; LEHMAN BROTHERS HOLDINGS, INC., a Delaware corporation; AIRSPAN NETWORKS, INC., Nominal Defendant, a Washington corporation; DEUTSCHE BANK SECURITIES, INC.; LEHMAN BROTHERS, INC., *Defendants-Appellees*, and JAMES W. GIDDENS, Trustee for the Liquidation of the Business of Lehman Brothers, Inc., *Trustee-Appellee*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35324 D.C. No. 2:07-cv-01638-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS & CO.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest BancBoston Robertson Stephens Inc.; ROBERTSON STEPHENS, INC.; INSWEB CORPORATION, a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No-09-35325 D.C. Nos. 2:07-cv-01630-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO., INCORPORATED; DEUTSCHE BANK SECURITIES, INC.; ASIAINFO HOLDINGS, INC., a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35326 D.C. Nos. 2:07-cv-01633-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc. and FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; J.P.MORGAN SECURITIES, INC.; KEYNOTE SYSTEMS, INC., a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35328 D.C. Nos. 2:07-cv-01634-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC.; DIGIMARC CORPORATION, Nominal Defendant, a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35327 D.C. No. 2:07-cv-01652-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS & CO.; BEAR STEARNS & CO., INC.; DEUTSCHE BANK SECURITIES, INC.; TIBCO SOFTWARE, INC., a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35331 D.C. Nos. 2:07-cv-01635-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MARTHA STEWART LIVING OMNIMEDIA INC., a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35333 D.C. Nos. 2:07-cv-01605-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; AUDIBLE INC., a Delaware corporation; J.P. MORGAN SECURITIES INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35334 D.C. Nos. 2:07-cv-01623-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS & CO., a New York limited partnership; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, a Delaware corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, ROBERTSON STEPHENS, INC., a Massachusetts corporation, *Defendants-Appellees*, and SABA SOFTWARE, INC., a Delaware corporation, *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35335 D.C. Nos. 2:07-cv-01637-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; DEUTSCHE BANK SECURITIES INC., a Delaware corporation; CITIGROUP GLOBAL MARKETS, INC., a New York corporation, *Defendants-Appellees*, and TRANSMETA CORPORATION, a Delaware corporation, *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35337 D.C. Nos. 2:07-cv-01636-JLR 2:07-cv-01549-JLR
VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CAPTSONE TURBINE CORPORATION, a Delaware corporation; GOLDMAN SACHS & CO.; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; MORGAN STANLEY & CO. INCORPORATED, *Defendants-Appellees*, *In Re: SECTION 16(b) LITIGATION*	No. 09-35339 D.C. Nos. 2:07-cv-01624-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO. INCORPORATED; BROCADE COMMUNICATIONS SYSTEMS, INC., a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35344 D.C. Nos. 2:07-cv-01626-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Robertson Stephens, Inc.; J.P. MORGAN SECURITIES INC.; ROBERTSON STEPHENS, INC.; OPLINK COMMUNICATIONS, INC., a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35345 D.C. Nos. 2:07-cv-01667-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC.; NAVASITE, INC., a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35346 D.C. No. 2:07-cv-01666-JLR
VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; DEUTSCHE BANK SECURITIES, INC., a Delaware corporation; ASPECT MEDICAL SYSTEMS, INC., Nominal Defendant, a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35347 D.C. No. 2:07-cv-01655-JLR

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<tr><td>VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; BEAR STEARNS & CO., INC.; PACKETEER, INC., Nominal Defendant, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION</td><td>No. 09-35348
D.C. No.
2:07-cv-01654-JLR</td></tr>
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Plaintiff-Appellant,
v.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; OMNIVISION TECHNOLOGIES, INC., a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION</td><td>No. 09-35349
D.C. Nos.
2:07-cv-01668-JLR
2:07-cv-01549-JLR</td></tr>
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VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE SECURITIES (USA), LLC; OCCAM NETWORKS, INC., a Delaware corporation, FKA Accelerated Networks, Inc., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35350 D.C. Nos. 2:07-cv-01669-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. J.P. MORGAN SECURITIES INC.; BEAR STEARNS & CO., INC.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; IMMERSION CORPORATION, a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35351 D.C. Nos. 2:07-cv-01670-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; CREDIT SUISSE SECURITIES (USA), LLC; J.P. MORGAN SECURITIES, INC.; INTERNAP NETWORK SERVICES CORPORATION, Nominal Defendant, a Delaware corporation, *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35352 D.C. No. 2:07-cv-01653-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. MICROTUNE INC., a Delaware corporation; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35355 D.C. No. 2:07-cv-01627-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.,; MORGAN STANLEY & CO. INCORPORATED; ROBERTSON STEPHENS, INC.; EXTREME NETWORKS INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35357 D.C. No. 2:07-cv-01628-JLR 2:07-cv-01549-JLR
VANESSA SIMMONDS, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Robertson Stephens, Inc.; J.P. MORGAN SECURITIES INC.; ROBERTSON STEPHENS, INC.; COSINE COMMUNICATIONS INC., a Delaware corporation; GOLDMAN SACHS & CO., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35358 D.C. Nos. 2:07-cv-01629-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellee*, v. CREDIT SUISSE SECURITIES (USA) LLC; CREDIT SUISSE SECURITIES (USA) LLC; J.P. MORGAN SECURITIES INC.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC., *Defendants-Appellants*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35363 D.C. Nos. 2:07-cv-01549-JLR 2:07-cv-01549-JLR ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted October 5, 2010
Seattle, Washington

Filed December 2, 2010
Amended January 18, 2011

Before: Sidney R. Thomas and Milan D. Smith, Jr.,
Circuit Judges, and Michael R. Hogan,
District Judge.*

Opinion by Judge Milan D. Smith, Jr.;
Concurrence by Judge Milan D. Smith, Jr.

COUNSEL

Jeffrey I. Tilden and Mark A. Wilner, Gordon Tilden Thomas & Cordell L.L.P., Seattle, Washington; Ian S. Birk, Keller Rohrback L.L.P., Seattle, Washington; David M. Simmonds, Redmond, Washington, for the plaintiff-appellant-cross-appellee.

David H. Kistenbroker and Joni S. Jacobsen, Katten Muchin Rosenman LLP, Chicago, Illinois; Michael L. Charlson, Hogan & Hartson, Palo Alto, California; John C. Tang, Latham & Watkins LLP, Menlo Park, California; John V. Erickson, Collette Erickson Farmer & O'Neill LLP, San Francisco, California; L. Rex Sears, Workman Nydegger, Salt Lake City, Utah, for the defendants-appellees.

Andrew B. Clubok, Kirkland & Ellis, LLP, Washington, D.C.; Christopher B. Wells, Lane Powell PC, Seattle, Washington; Gandolfo V. DiBlasi, Sullivan & Cromwell LLP, New York, New York; Joel M. Mitnick, Sidley Austin LLP, New York, New York; David W. Ichel, Simpson, Thacher & Bartlett LLP, New York, New York; Andrew J. Frackman,

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* The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sitting by designation.

O'Melveny & Myers LLP, New York, New York; Robert B. McCaw, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, for the defendants-appellees-cross-appellants.

OPINION

M. SMITH, Circuit Judge:

Plaintiff-Appellant Vanessa Simmonds appeals the district court's dismissal of fifty-four related derivative complaints brought under Section 16(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78p(b). Simmonds's complaints allege that the Defendant-Appellee investment banks (collectively, Underwriters) violated Section 16(b) by engaging in prohibited "short-swing" transactions in connection with the Initial Public Offerings (IPOs) of the fifty-four Defendant-Appellee corporations (collectively, Issuing Companies) between 1999 and 2000. Simmonds seeks disgorgement of the Underwriters' alleged short-swing trading profits.

We affirm the district court's conclusion (rendered in the thirty cases in which the issue was raised) that Simmonds failed to present an adequate demand letter to the Issuing Companies prior to filing her lawsuits, and we remand these cases to the district court to dismiss the complaints with prejudice. We reverse the district court's conclusion that the remaining twenty-four cases are barred by Section 16(b)'s two-year statute of limitations, and we remand these cases to the district court so that all defendants, including the Underwriters, have a full opportunity to contest the adequacy of Simmonds's demand letters with respect to the remaining twenty four cases.

FACTUAL AND PROCEDURAL BACKGROUND

In her First Amended Complaints (Complaints), Simmonds alleges that while the Underwriters were acting as lead underwriters on the Issuing Companies' IPOs, they coordinated their activities with the Issuing Companies' officers, directors, and principal shareholders (collectively, Insiders) in order to obtain financial benefits from post-IPO increases in the Issuing Companies' stock prices.[1] Simmonds alleges that the Insiders entered "lock-up agreements" with the Underwriters that prevented the Insiders from offering or selling their stock for 180 days following the IPO. The purpose of the lock-up agreements was to "collectively hold[ ] ... and refrain[ ] from selling" the Insiders' shares, and the Underwriters and Insiders intended to receive financial benefits by selling these shares into an inflated market after the lock-up agreements expired. In order to create this inflated market, the Underwriters and Insiders allegedly agreed to release the IPO to the general public at a discount to the price that "they knew to be the likely aftermarket price range ... based on clear indications of IPO and aftermarket demand." The Underwriters also allegedly inflated the post-IPO share prices by engaging in a practice known as "laddering"—in exchange for giving their customers access to IPO allocations, the Underwriters required their customers (including the Issuing Companies' Insiders) to purchase shares "at progressively higher

[1] The appeals have been stayed as to Defendant Lehman Brothers, Inc. pending resolution of its bankruptcy proceedings.

prices" following the IPO.[2] Finally, Simmonds asserts that the Underwriters engaged in "improper research-related activities that were designed to inflate the market price" of the shares.[3]

According to Simmonds, these allegations establish that the Underwriters and Insiders acted as a group and coordinated their conduct with respect to acquiring the Issuing Companies' stock, holding the stock, and disposing of the stock "so as to share in the profits gained in the aftermarket following the IPO."

Simmonds alleges that the Underwriters had three types of "direct or indirect pecuniary interest[s]" in the Issuing Companies' stock that allowed the Underwriters to "profit[ ] from purchases and sales, or sales and purchases" of that stock. (The Complaints define these transactions as the operative "Short-Swing Transactions" for purposes of these lawsuits.) First, the Underwriters "shar[ed] in the profits of customers to whom they made IPO

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[2] "Laddering ... is a practice that involves requiring IPO purchasers to commit to purchase additional shares in the after-market. Laddering not only provides improper consideration for the allocation of IPO shares, but also creates additional demand in the aftermarket, designed to insure rising prices once the shares are publicly traded." 2 Thomas Lee Hazen, *Law of Securities Regulation* § 6.0 (6th ed. Supp. 2010) (hereinafter Hazen).

[3] Some of the Complaints include specific factual details regarding the Underwriters' publication of favorable ratings on the Issuing Companies' stock. In addition, some of the Complaints describe the Underwriters' participation in secondary stock offerings.

allocations" of the Issuing Companies' stock. Second, the Underwriters "allocat[ed] shares of [the Issuing Companies'] stock to executives and other high-level insiders of other companies, both private and public, from which [the Underwriters] expected to receive new or additional investment banking business in return." Finally, the Underwriters "creat[ed] the opportunity for other members of the [g]roup to derive personal financial benefits from the sale of the [the Issuing Companies'] stock into an inflated market, in an effort by [the Underwriters] to obtain future investment banking business from [the Issuing Companies]."[4]

In her Complaints, Simmonds seeks to compel the Underwriters to disgorge the profits they received from these "Short-Swing Transactions." Simmonds alleges that prior to filing the Complaints, she submitted demand letters insisting that the Issuing Companies seek this relief directly (as is their right under Section 16(b)). When more than sixty days had lapsed after she sent the demand letters, Simmonds filed the Complaints at issue in this appeal.

The Underwriters jointly filed a motion to dismiss Simmonds's Complaints under Fed. R. Civ. P. 12(b)(6). The Underwriters contended that

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[4] The final two activities are commonly known as "spinning," which is "[t]he giving of shares or preferred opportunities to buy shares in an initial public offering to key investment-banking clients in order to solicit or retain profitable business in the future." *Black's Law Dictionary* 1531 (9th ed. 2009).

Simmonds's claims were time-barred, that Simmonds's Complaints failed to state a cause of action under Section 16(b), and that the Underwriters are protected by various exemptions from Section 16(b). Thirty of the Issuing Companies (collectively, Moving Issuers) filed a separate motion to dismiss under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).[5] The Moving Issuers argued that Simmonds's claims were time-barred and that Simmonds lacked standing because she failed to submit adequate demand letters to the Issuing Companies prior to filing suit.

The district court granted the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motions to dismiss based on the inadequacy of Simmonds's demand letters, and granted the Underwriters' Fed. R. Civ. P. 12(b)(6) motions to dismiss based on the two-year statute of limitations. *In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1211-18 (W.D. Wash. 2009). The court did not address the Underwriters' remaining arguments

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[5] The Moving Issuers—all of which are Delaware corporations—are Akamai Technologies, Inc.; Ariba, Inc.; AsiaInfo Holdings, Inc.; Aspect Medical Systems, Inc.; Audible, Inc.; Avici Systems, Inc. (now named Soapstone Networks, Inc.); Capstone Turbine Corporation; Cosine Communications, Inc.; Digimarc Corporation; Finisar Corporation; ~~Digimarc Corporation;~~ Internap Networks Service Corporation; Intersil Corporation; Martha Stewart Living Omnimedia, Inc.; Maxygen, Inc.; NaviSite Inc.; Occam Networks, Inc.; Onvia, Inc.; ~~Openwave Systems Inc.;~~ Oplink Communication, Inc.; Packeteer Inc.; Perot Systems Corporation; Priceline.com, Inc.; RedHat, Inc.; Saba Software, Inc.; Selectica, Inc.; Silicon Laboratories, Inc.; Sonus Networks, Inc.; Sycamore Networks, Inc.; TheStreet.com, Inc.; TiVo, Inc.; and Vignette Corporation.

regarding the merits of Simmonds's allegations and the scope of the Underwriters' exemptions from Section 16(b). *See id.* at 1205, 1219. The court dismissed without prejudice the thirty actions resolved by the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motions. *Id.* at 1218. The court dismissed the remaining twenty-four cases with prejudice in light of its ruling on the statute of limitations. *Id.*

Simmonds filed a timely appeal, and the thirty Moving Issuers filed timely cross-appeals requesting that the district court's dismissals of their cases be entered with prejudice rather than without prejudice. We granted the parties' joint motion to consolidate the cases on appeal pursuant to Fed. R. App. P. 3(b)(2).

JURISDICTION AND STANDARD OF REVIEW

Ordinarily, "[a] dismissal of a complaint without prejudice is not a final order." *Martinez v. Gomez*, 137 F.3d 1124, 1125 (9th Cir. 1998). However, the district court's orders in these cases are final and appealable because "leave to amend was not specifically allowed and [Simmonds] cannot amend [her] complaint to defeat the statute of limitations bar" as construed by the district court. *Id.* at 1125-26. Accordingly, we have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's dismissal for failure to comply with the demand requirement for abuse of discretion. *Potter v. Hughes*, 546 F.3d 1051, 1056, 1058 (9th Cir. 2008).[6] We review the district court's dismissal on statute of limitations grounds de novo. *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 1047 (9th Cir. 2008). We refrain from reviewing issues not addressed by the district court. *Golden Gate Hotel Ass'n v. City & Cnty. of S.F.*, 18 F.3d 1482, 1487 (9th Cir. 1994) ("As a general rule, a federal appellate court does not consider an issue not passed upon below." (internal quotation marks omitted)).

DISCUSSION

[1] "Congress enacted Section 16(b) as part of the Exchange Act to prevent corporate insiders from exploiting their access to information not generally available to others." *Dreiling v. Am. Online Inc.*, 578 F.3d 995, 1001 (9th Cir. 2009) (internal quotation marks and alterations omitted). Section 16(b) requires corporate insiders to disgorge any trading profits they obtain in any "short-swing" transaction, which is defined as "a coupled purchase-and-sale, or sale-and purchase, completed within six months." *Dreiling v. Am. Express Co.*, 458 F.3d 942, 947 (9th

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[6] The Moving Issuers challenged Simmonds's compliance with the demand requirement in a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The demand requirement is an element of prudential statutory standing rather than constitutional Article III standing. *Potter*, 546 F.3d at 1055-56. While Article III standing may be raised in a Fed. R. Civ. P. 12(b)(1) motion, questions of statutory standing must be raised in a Fed. R. Civ. P. 12(b)(6) motion. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174-75 (9th Cir. 2004). We construe the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motion as a Fed. R. Civ. P. 12(b)(6) motion. *See, e.g., Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995).

Cir. 2006) (citing 15 U.S.C. § 78p(b)). There are four basic elements of a Section 16(b) claim: "(1) a purchase and (2) a sale of securities (3) by an officer or director of the issuer or by a shareholder who owns more than ten percent of any one class of the issuer's securities (4) within a six-month period." *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

The purpose of the rule is not to punish specific instances of wrongdoing or remedy harms suffered by particular individuals. Rather, the law is "aimed at protecting the public" by preventing corporate insiders from exploiting inside information at the expense of ordinary investors. *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 592 (1973). In order to fulfill this purpose, Section 16(b) "is a blunt instrument, at once both over- and under-inclusive." *Dreiling v. Am. Express*, 458 F.3d at 947. It "is over-inclusive in that it imposes strict liability regardless of motive, including trades not actually based on inside information," and "[i]t is under-inclusive in that there is no liability for trades made on inside information if more than six months transpire between purchase and sale." *Id.*

This appeal focuses on a pair of procedural prerequisites to filing a Section 16(b) lawsuit: the demand requirement, and the statute of limitations. Shareholders may only file a Section 16(b) suit after requesting that the issuing company take appropriate action against its insiders. If sixty days pass after a shareholder demand has been made without the issuing company resolving the matter (either informally or via lawsuit), shareholders may file suit on the issuing company's behalf. However, shareholders must file their suit within two years of the transactions at issue, subject to the tolling rules described in greater detail *infra*.

A. Demand Requirement

[2] Section 16(b) provides in relevant part that all insider short-swing trading profits "shall inure to and be recoverable by the issuer," and "[s]uit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter ...." 15 U.S.C. § 78p(b). The issuing company's right to recover the insider's trading profits "is simply an application of an old principle in the law that if you are an agent and you profit by insider information concerning the affairs of your principal, your profits go to your principal." *Stock Exchange Regulation: Hearing Before the H. Comm. on Interstate and Foreign Commerce,* 73d Cong. 133 (1934) (statement of Thomas Corcoran, Counsel, Reconstruction Fin. Corp.) [7]

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[7] Certain courts and commentators have suggested that Section 16(b) actions are not true derivative actions. *E.g., Dottenheim v. Murchison,* 227 F.2d 737, 738 (5th Cir. 1956); *Schaffer v. CC Investments, LDC*, 286 F. Supp. 2d 279, 281-82 (S.D.N.Y. 2003); 4 Hazen, *supra*, § 13.2 n.41; Peter J. Romeo & Alan L. Dye, *Section 16 Treatise and Reporting Guide*, § 9:03[1][a] (3d ed. 2008) (hereinafter Romeo & Dye.) We refrain from examining this question more closely because it is not relevant to the issues at hand. We note that derivative and quasi-derivative actions are generally governed by the

[3] Section 16(b) does not set forth any additional details regarding the nature and scope of this statutory demand requirement. In light of this Congressional silence, we turn to state law for guidance. The Supreme Court has explained that "where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991). Applying this broad principle in the context of the Investment Company Act of 1940, the Kamen Court held that "the contours of the demand requirement" (in that case, the standards governing demand futility) must be determined by the law of the state of incorporation. *Id*. at 101.

[4] Here, the adequacy of Simmonds's Section 16(b) demand letters is disputed in the thirty cases involving the Moving Issuers, all of which are Delaware corporations.[8] In light of the principles

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procedural requirements of Fed. R. Civ. P. 23.1. *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 533-34 (1984). However, two of our sister circuits have suggested that Rule 23.1 does not apply in Section 16(b) actions. *Portnoy v. Kawecki Berylco Indus., Inc.*, 607 F.2d 765, 767 n.3 (7th Cir. 1979); *Dottenheim*, 227 F.2d at 738. We refrain from deciding this question because it is not relevant to our analysis.

[8] Our analysis of Simmonds's demand letters is limited to the thirty cases in which the Moving Issuers contested the adequacy of Simmonds's demand. Although we have no reason

articulated in *Kamen*, these thirty demand letters must be analyzed in accordance with Delaware law, unless there is a conflict between Delaware law and federal law that "would frustrate specific objectives" of Section 16 and the Exchange Act. *Kamen*, 500 U.S. at 98 (citation, internal quotation marks, and alterations omitted). Our task under *Kamen* is the same as in any case decided under state law after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). We must "'approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.'" *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (quoting *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001)). Accordingly, we must follow the Delaware Supreme Court's pronouncements, or, if the Delaware Supreme Court has not addressed the question, "we must predict how the Court will decide the issue, based on decisions of Delaware courts, decisions from other jurisdictions, treatises and restatements." *Matsuura v. Alston & Bird*, 166 F.3d 1006, 1008 n.3 (9th Cir. 1999) (per curiam). In other contexts, we have relied

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to doubt Simmonds's assertion that she submitted "similar demands" to the twenty-four issuing companies that did not join the Motion to Dismiss, these letters are not currently part of the record and must be examined by the district court in the first instance. Accordingly, our analysis does not involve the twenty cases involving Delaware issuers who did not join the Moving Issuers' Motion to Dismiss, the two cases involving California issuers (Critical Path, Inc., and Openwave Systems, Inc.), or the cases involving a Washington issuer (Airspan Networks, Inc.) and a Bermuda issuer (Marvell Technology Group, Ltd.).

on the Delaware Court of Chancery's decisions as accurate statements of Delaware law, *id.* at 1008, and we note that there are particularly compelling reasons for following the Delaware Court of Chancery's decisions because it is widely recognized as the nation's leading authority on corporate law issues, *see*, *e.g.*, William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351 (1992).

The Delaware Supreme Court has explained that the demand requirement exists "first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits." *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984), *overruled en banc on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 & n.13 (Del. 2000). "The purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur." *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990).[9] These justifications are not

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[9] Another justification for the demand requirement is that the demand allows the corporation to exercise its business judgment and decide not to pursue the claim. *See Aronson*, 473 A.2d at 812 (noting that business judgment rule permits "independent disinterested directors to dismiss the action as inimical to the corporation's best interests"). This justification is inapplicable in Section 16(b) litigation because "[a]ny stockholder has a right to institute suit if the corporation fails to do so, regardless of the good faith or reasonable business

unique to Delaware. The Supreme Court has repeatedly highlighted these points, *Kamen*, 500 U.S. at 101; Daily Income Fund, 464 U.S. at 533, as have our sister circuits,[10] and leading commentators have approved.[11] As we have previously stated, the demand rule "is not merely a technical or unimportant requirement." *Potter*, 546 F.3d at 1058. Rather, it flows from "the general rule of American law ... that the board of directors controls a corporation." *Id.* Indeed, the policies animating shareholder demands are particularly relevant in the Section 16(b) context. "Anecdotal evidence suggests that well over 90 percent of all Section 16(b) claims are settled privately, without any lawsuit being filed." Romeo & Dye, *supra*, § 9.01[7][c] (footnote omitted). This figure would almost certainty be lower if Section 16(b) did not contain a demand

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judgment of the board of directors." *Pellegrino v. Nesbit*, 203 F.2d 463, 467 (9th Cir. 1953).

[10] *E.g., Grossman v. Johnson*, 674 F.2d 115, 125 (1st Cir. 1982); *Lewis v. Graves*, 701 F.2d 245, 247-48 (2d Cir. 1983); *Shaev v. Saper*, 320 F.3d 373, 377 (3d Cir. 2003); *Hoffman v. Kramer*, 362 F.3d 308, 317 n.4 (5th Cir. 2004); I*n re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 618 (6th Cir. 2008); *Boland v. Engle*, 113 F.3d 706, 712 (7th Cir. 1997); *Allright Missouri, Inc. v. Billeter*, 829 F.2d 631, 638 (8th Cir. 1987); *Stepak v. Addison*, 20 F.3d 398, 402 (11th Cir. 1994); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 65 (D.C. Cir. 1988).

[11] 13 William Meade *Fletcher, Fletcher Cyclopedia of the Law of Corporations* § 5963 (Supp. 2010); American Law Institute, *Principles of Corporate Governance* § 7:03 cmt. c. (1992 & Supp. 2010); Daniel R. Fischel, Comment, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. Chi. L. Rev. 168, 171-72 (1976).

requirement, as shareholder demands allow boards to investigate the allegations and resolve matters without resorting to costly and burdensome litigation.

[5] To give effect to these general policies, the Delaware Chancery has required that demand letters "specifically state: (i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw v. Talley*, Civ. A. No. 12882, 1994 WL 89019, at *7 (Del. Ch. Mar. 2, 1994) (unpublished opinion), *reprinted in* 20 Del. J. Corp. L. 454.[12] Furthermore, "the party asserting that a demand was made ... bear[s] the burden of proof ...." *Id.* These requirements flow directly from the underlying justifications for the demand requirement: "[i]t is essential that the communication contain these three elements to enable the board to perform its duty to make a good faith investigation of claims of alleged wrongdoing, and, where appropriate, to rectify the misconduct." *Id.* We believe that this is a correct statement of Delaware law as it would be decided by the Delaware Supreme Court. This standard was announced by a vice chancellor who was later elevated to the state supreme court, *see Gatz v. Ponsoldt*, No. Civ. A. 174-N, 2004 WL 3029868, at *5 (Del. Ch. Nov. 5, 2004) (unpublished opinion), and,

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[12] Delaware rules of court allow citation to unpublished chancery decisions. 1 David A. Drexler, et al., *Delaware Corporation Law and Practice* § 2.05 (2009).

more importantly, this standard has been uniformly followed in subsequent Chancery decisions.[13] Accordingly, under *Kamen* and our general *Erie* jurisprudence, we apply this legal standard (and the Delaware courts' applications of it) except where it "frustrate[s] specific objectives" of Simmonds's federal cause of action. *See Kamen*, 500 U.S. at 98.[14]

Here, the thirty demand letters at issue in the Moving Issuers' motion (all of which were identical in

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[13] *FLI Deep Marine LLC v. McKim*, No. Civ. A. 4138-VCN, 2009 WL 1204363, at *1 n.6 (Del. Ch. Apr. 21, 2009) (unpublished opinion); *Khanna v. McMinn*, No. Civ. A. 20545-NC, 2006 WL 1388744, at *13 (Del. Ch. May 9, 2006) (unpublished opinion); *Gatz*, 2004 WL 3029868, at *5.

[14] The federal district court in Delaware has articulated a similar standard regarding the demand requirement: "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief. In most instances, the shareholder need not specify his legal theory, every fact in support of that theory, or the precise quantum of damages." *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del.), *aff'd mem.*, 782 F.2d 1026 (3d Cir. 1985). Many federal courts, including the district court in this case, have relied on *Allison* or its federal progeny when addressing the adequacy of a demand under Delaware law. *See, e.g., Richelson v. Yost*, __ F. Supp. 2d __, No. 10-1342, 2010 WL 3563108, at *8 (E.D. Pa. Sept. 9, 2010); *Dreiling v. Am. Express Co.*, 351 F. Supp. 2d 1077, 1085 (W.D. Wash. 2004), *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006); *Levner v. Saud*, 903 F. Supp. 452, 456 (S.D.N.Y. 1994), a*ff'd sub nom. Levner v. Prince Alwaleed*, 61 F.3d 8, 9 (2d Cir. 1995); *Rubin v. Posner*, 701 F. Supp. 1041, 1045 (D. Del. 1988). We believe, however, that the better approach is to rely on Delaware state courts to the greatest extent possible. Under *Kamen*, we give preference to the state courts' approach.

all material respects) stated the following pertinent facts.[15] "[T]he Company's IPO underwriters, in addition to certain of its officers, directors and principal shareholders, as identified in the IPO prospectus ... coordinated their efforts for the purpose of acquiring, holding, and/or disposing of securities of the Company," obtained beneficial ownership of shares amounting to more than 10% of the company's outstanding common stock in the year following the IPO, "engaged in purchases and sales of Company within periods of less than six months during" that year, and failed to report those transactions as required by Section 16(a). Simmonds "demand[ed] that the board of directors prosecute a claim against" those persons "for violations of § 16(b) of the Securities Exchange Act of 1934," in order to "compel[ ] [them] to disgorge the profits they made through purchases and sales of Company stock."

In response to twenty-five of the thirty Moving Issuers' requests for additional information, Simmonds explained that "the challenged transactions involved the activities of the lead underwriters, the other IPO underwriters, and the officers, directors and principal shareholders of the Company ... related to improper IPO allocation (so-called 'laddering' and 'spinning') and research and

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[15] The demand letters were identified in the Complaints, and the thirty letters sent to the Moving Issuers were submitted to the district court as part of their Motion to Dismiss. Because the parties did not dispute the authenticity of these documents, we may consider them without converting the motion to dismiss into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

stock rating activities during the Relevant Period. As you are aware, information regarding these activities is readily available at court, law firm and SEC websites."[16]

[6] Simmonds's initial demand letters satisfied the first part of the Delaware test for demand adequacy, which requires the shareholder to state "the identity of the alleged wrongdoers." *Yaw*, 1994 WL 89019, at *7. In *FLI Deep Marine v. McKim*, the plaintiff's demand letter stated that "'certain employees, officers and directors of [the company] and others'" had diverted and misappropriated the company's assets. *FLI Deep Marine*, 2009 WL 1204363, at *1 (quoting demand letter). The Court of

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[16] These follow-up letters were not mentioned in the Complaints or submitted by any of the Defendants in connection with the various motions to dismiss. Rather, they were submitted by Simmonds in opposition to the Moving Issuers' Motion to Dismiss. Ordinarily such extrinsic evidence may not be considered at this stage of the litigation. *See Knievel*, 393 F.3d at 1076. The district court determined, however, that these documents could be considered as part of the defendants' challenge to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *See In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1210 (W.D. Wash. 2009) ("A jurisdictional challenge under [Rule 12(b)(1)] may be made on the face of the pleadings or by presenting extrinsic evidence." (citing *Warren v. Fox Family Worldwide*, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)). Because we are proceeding under Fed. R. Civ. P. 12(b)(6) rather than Fed. R. Civ. P. 12(b)(1), we do not have the benefit of going beyond the pleadings as the district court did. However, we may consider Simmonds's follow-up letters to support our conclusion that Simmonds's thirty Complaints involving the Moving Issuers must be dismissed with prejudice. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

Chancery stated that this letter was sufficient to satisfy the first prong of Yaw. *Id.* at *1 n.6. Simmonds's demand letters identify the alleged wrongdoers with a similar level of precision as in the *FLI Deep Marine* plaintiff's demand letter. Specifically, Simmonds's letters identified "the Company's IPO underwriters, in addition to certain of its officers, directors and principal shareholders, as identified in the IPO prospectus." Although the Moving Issuers contend that their respective prospectuses listed between eleven and fifty-one underwriters, officers, and directors, and we acknowledge that this is a close question, we follow the Court of Chancery's approach in *FLI Deep Marine*.[17] Because Simmonds's demand letters identified a closed set of alleged wrongdoers, we agree with the district court that "the demand letters in this case sufficiently identify the alleged wrongdoers." *In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1212.

Simmonds's letters failed, however, to satisfy the second and third prongs of the Delaware test for demand adequacy, which require the shareholder to identify the "wrongdoing ... allegedly perpetrated" and "the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw*, 1994

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[17] The Court of Chancery's approach is in tension with the Third Circuit's holding in *Shlensky v. Dorsey*, 574 F.2d 131, 140-41 (3d Cir. 1978), in which the court held that demand letters were inadequate where they alleged that the "responsible individuals" should be held accountable.

WL 89019, at *7.[18] Simply put, Simmonds's demand letters presented factual theories that vary significantly from the facts alleged in the Complaints. Her demand letters claimed that the Underwriters directly bought and sold the Issuing Companies' shares, and accordingly requested that the Issuing Companies seek disgorgement of the Underwriters' trading profits. In contrast, her Complaints do not allege that the Underwriters directly participated in buying and selling the Issuing Companies' stock, and instead seek disgorgement of the profits the Underwriters received through their investment banking operations.[19]

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[18] Although the Delaware courts require the demand to describe "the resultant injury to the corporation," *Yaw*, 1994 WL 89019, at *7, this requirement "frustrate[s] specific objectives" of Section 16(b) by adding an additional element to the Section 16(b) cause of action. *See Kamen*, 500 U.S. at 98. Section 16(b) exists to remedy harms suffered by the general investing public, not harms suffered by issuing corporations. *See Kern County*, 411 U.S. at 591-92; *Champion Home Builders Co. v. Jeffress,* 490 F.2d 611, 619 (6th Cir. 1974) ("the absence of corporate damage is not a factor in assessing § 16(b) liability"). Accordingly, a shareholder's demand letter need not identify any corporate injury in order to satisfy the demand requirement of Section 16(b).

[19] In *Simmonds v. Morgan Stanley & Co., Inc.*, No. 09-35352, Simmonds alleges that Morgan Stanley and J.P. Morgan (the successor-in-interest to Hambrecht & Quist LLC) respectively sold $46.5 million and $34.6 million in shares of Internap Network Services Corporation as part of a secondary offering. Although Simmonds identified these transactions in her Complaint, she failed to allege that these transactions violated Section 16(b) and she failed to seek disgorgement of

[8] According to the Complaints, the Underwriters violated Section 16(b) when they profited *indirectly* through their *customers'* purchases and sales of the Issuing Companies' shares. Specifically, the Complaints allege that the Underwriters engaged in "Short-Swing Transactions" when (1) their existing customers purchased and sold the issuing company's stock, (2) they obtained new banking customers in exchange for giving other companies' insiders favorable consideration in the issuing company's IPO, and (3) they obtained additional banking business from the issuing company in exchange for helping the issuing company's insiders profit from their own company's IPO. The Complaints assert that these "Short-Swing Transactions" violated Section 16(b), and request disgorgement of profits obtained through these "Short-Swing Transactions." None of these alleged transactions is referenced in any way in the original demand letters submitted to the Moving Issuers. The garden-variety Section 16(b) claim made out in these demand letters bears no resemblance to the elaborate scheme described in Simmonds's Complaints.

[9] Even if we consider Simmonds's follow-up letters to twenty-five of the Moving Issuers, she failed to identify the wrongful acts "clearly and specifically." *Yaw*, 1994 WL 89019, at *8. The

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any profits obtained from these transactions. Accordingly, her demand letter to Internap Network Services Corporation (which is one of the Moving Issuers), was defective for the same reasons as in the other cases.

follow-up letters noted that the "challenged transactions ... [are] related to improper IPO allocation (so-called 'laddering' and 'spinning') and research and stock rating activities." Simmonds's conclusory references to "laddering," "spinning," and "research and stock rating," were vague and ambiguous, as was her open ended reference to "court, law firm and SEC websites," and completely failed to provide sufficiently detailed information to permit the boards to conduct a good faith inquiry into the alleged wrongdoing.

[10] Moreover, because the demand letters and the Complaints contain distinct factual assertions, the demand letters also failed to set forth "the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw*, 1994 WL 89019, at *7. The demand letters requested that the Moving Issuers "compel[ ]" the Underwriters and other group members to "disgorge the profits they made through purchases and sales of [the issuing company's] stock." The Complaints, on the other hand, do not mention the Underwriters' direct trading profits, and instead seek disgorgement of the profits the Underwriters received through their investment banking operations.

[11] The Court of Chancery has noted that demand letters must be sufficiently specific to "enable the board to perform its duty to make a good faith investigation of claims of alleged wrongdoing[ ] and ... to rectify the misconduct" at issue in a subsequent lawsuit. *Yaw*, 1994 WL 89019, at *7. The court further noted that "to require a board to investigate claims asserted ambiguously ... would not be an efficient use of corporate resources, because the board would lack the information necessary to make a good faith inquiry." *Id.* Simmonds's demand letters were particularly inadequate because they described a different course of conduct than the one she described in her Complaints. And clearly, Simmonds's demand letters could have led directors to investigate facts (the Underwriters' purchases and sales of Issuing Company stock) that were only marginally related to the issues ultimately raised in the Complaints (the Underwriters' *customers'* purchases and sales of Issuing Company stock, and associated profit-sharing agreements between the Underwriters and their customers).

We are not persuaded by Simmonds's argument that the Moving Issuers subjectively understood what she meant in her demand letters. Delaware case law sets forth an objective standard for assessing the adequacy of a demand and does not inquire whether the board of directors had independent knowledge of relevant information. To the extent that Simmonds's argument has been addressed by any courts, it has been soundly rejected. For example, the Third Circuit has rejected a shareholder's argument that a conclusory demand was adequate because "the directors were in a better position than the shareholders to make the investigation necessary to uncover wrongdoers." *Shlensky*, 574 F.2d at 141. In the related context of demand refusal, the Delaware Supreme Court rejected the argument that "[t]he board has better access to the relevant facts" and plaintiffs should therefore be relieved of their burden to show that the board's refusal was improper. *Levine v. Smith*, 591 A.2d 194, 209 (Del. 1991) (internal quotation marks omitted), *overruled en banc on other grounds by Brehm*, 746 A.2d at 253 & n.13.

Simmonds's argument is an end-run around Delaware's requirement that shareholders make reasonably specific demands, and were we to adopt Simmonds's proposed approach, Delaware's demand standard would be eviscerated. Plaintiffs in derivative actions often seek relief for a corporate insider's wrongdoing. If the demand requirements were relaxed on account of insiders' subjective knowledge, then shareholders would *never* have to "clearly and specifically" describe their assertions in a demand letter. *See Yaw*, 1994 WL 89019, at *8. To the extent that Simmonds believed that relevant information was "readily available at court, law firm and SEC websites" as she claimed in her follow-up letters, it was her burden under Delaware law to distill the relevant facts and present them to the board. ~~If Simmonds lacked access to necessary information that was exclusively within the corporation's possession, Delaware law specifically allows a shareholder to examine "[t]he corporation's stock ledger, a list of its stockholders, and its other books and records," Del. Code Ann. tit. 8, § 220(b)(1), and Delaware courts have strongly encouraged shareholders to avail themselves of such investigative tools, *see King v. VeriFone Holdings, Inc.*, 994 A.2d 354, 356 & nn.2-3 (Del. Ch. 2010) (collecting cases). In short, Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation.~~ Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation, and this rule is not clearly incompatible with Section 16 and the Exchange Act.

~~Simmonds also argues in part that these Delaware rules are incompatible with Section 16. She alleges that she was unable to obtain necessary information because the group members failed to file Section 16(a) reports as required by federal law. We disagree with Simmonds's contention that Delaware's demand-specificity requirement is incompatible with Section 16(b). Delaware law expressly permits shareholders to inspect the corporation's "stock ledger," which "is a compilation of the transfers by and to each individual shareholder, with each transaction separately posted to separately maintained shareholder accounts."~~ ~~*Crown EMAK Partners, LLC v. Kurz*~~~~, 992 A.2d 377, 393 (Del. 2010) (en banc) (internal quotation marks omitted). In most Section 16(b) cases, a request to inspect the issuing company's books and records (including the stock ledger) would likely allow shareholders to gather enough information to submit an adequate demand to the issuing company. Simmonds does not appear to have made any effort to obtain such information prior to submitting her demand letters and filing her lawsuits. Accordingly, we hold that Delaware's state law demand requirement is compatible with Section 16.~~

As an alternative to her argument that her demand letters were adequate, Simmonds contends that the demand requirement should be excused as futile. However, Delaware courts have repeatedly held that a shareholder concedes that a demand is not futile by submitting a demand to the board. "Delaware law could hardly be clearer" in holding that shareholders may not invoke the futility exception after submitting a demand to the board. *FLI Deep Marine*, 2009 WL 1204363, at *3; *see also id*. at *3 n.17 (collecting cases).

[12] We hold that the thirty demand letters in the record fail to satisfy the demand requirement under Delaware law. Accordingly, we affirm the district court's order granting the Moving Issuers' motions to dismiss the thirty cases to which they are parties.

B. Statute of Limitations

[13] The district court dismissed the cases involving the remaining twenty-four issuers (that is, the Issuing Companies that did not join the Moving Issuers' Motion to Dismiss) on account of the statute of limitations. Section 16(b) provides that " no ... suit shall be brought more than two years after the date such profit was realized" from the alleged short-swing transactions. 15 U.S.C. § 78p(b). We have previously issued a thorough decision interpreting this provision, *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981), and we are bound by our prior holding.

In *Whittaker*, a corporate insider engaged in prohibited short-swing transactions between December 1965 and December 1970. The corporation sought disgorgement in January 1971 without filing a lawsuit. The insider paid the full amount requested, but later filed suit against the corporation seeking to recover some of the money he had paid. *Id.* at 518-19. In the lawsuit, he argued that Section 16(b)'s statute of limitations barred the corporation from retaining any amounts that he had obtained from short-swing transactions prior to January 1969 (that is, two years prior to the time that the corporation requested that he disgorge his profits). *Id*. at 519. The district court agreed with the insider, and "found that various corporate officers had information which put the Corporation on notice throughout the relevant trading period" between 1965 and 1970. *Id.* at 527. Based on this factual finding, the district court allowed the corporation to recover the insider's profits only for the two years prior to the disgorgement request. *Id*. at 519, 527; *see also Whittaker v. Whittaker Corp.*, No. 75-2546, 1977 WL 1006, at *9-10 (C.D. Cal. Mar. 22, 1977) (setting forth factual findings in greater detail).

On appeal, we explained that there were three competing approaches to Section 16(b)'s statute of limitations: (1) a "strict" approach under which the statute is treated as a statute of repose—that is, a firm bar that is not subject to tolling; (2) a "notice" or "discovery" approach like the one that had been applied by the district court, "under which the time period is tolled until the Corporation had sufficient information to put it on notice of its potential § 16(b) claim;" and (3) a "disclosure" approach "under which the time period is tolled until the insider discloses the transactions at issue in his mandatory § 16(a) reports." *Whittaker*, 639 F.2d at 527. After thoroughly analyzing the merits of the competing interpretations, *id.* at 527-30, we held unequivocally that "the disclosure interpretation is the correct construction of § 16." *Id.* at 527. Under this approach, "an insider's failure to disclose covered transactions in the required § 16(a) reports tolls the two year limitations period for suits under § 16(b) to recover profits connected with such a non-disclosed transaction. The two-year period for § 16(b) begins to run when the transactions are disclosed in the insider's § 16(a) report." *Id.* at 530. Accordingly, we reversed the district court's use of the "notice" approach and held that the corporation could recover all of the insider's short-swing profits, even those obtained long after the corporation was on notice of the insider's trading. *Id.*

[14] In this case, the Defendants advance various arguments in an attempt to distinguish *Whittaker*. All of these arguments are variations on a single theme—Simmonds knew or should have known of the alleged wrongful conduct many years before she filed her Complaints. But despite the Defendants' arguments, the central holding of our opinion in *Whittaker*—both in our legal analysis and our application of the law to the facts of that case—is that the Section 16(b) statute of limitations is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue. We recently restated this holding in *Roth v. Reyes*, 567 F.3d 1077 (9th Cir. 2009), in which we concluded that the statute of limitations begins to run when the insider files a Section 16(a) report *even if* the contents of the filing inaccurately claim an exemption that does not actually apply. *Id.* at 1083. We explained that the basic act of filing a Section 16(a) report satisfies *Whittaker*'s disclosure requirement and "supports the goals of disclosure and transparency" underlying Section 16. *Id.* at 1083.

The Defendants advance four specific points in support of their general theory that *Whittaker* can be distinguished. First, they argue that *Whittaker* does not apply because Simmonds knew or should have known of the relevant facts sometime around 2001. By that time, much of the information described in the Complaints had been publicly disclosed in court filings, news reports, and the Issuing Companies' IPO registration filings. The Defendants contend that "[w]hen a party is aware of the necessary facts to bring a claim, there is no excuse for any delay beyond the statute of limitations period, let alone a delay of six years." However, this theory was plainly rejected in *Whittaker*. Our *Whittaker* decision *reversed* the district court's conclusion that the statute of limitations began to run at the time that "various corporate officers had information which put the Corporation on notice" of the insider's short-swing trades. *Whittaker*, 639 F.2d at 527. The Defendants' "notice" argument is an unpersuasive attempt to revive a theory that we considered and rejected nearly thirty years ago.

Second, the Defendants argue that the Section 16(b) limitations period should not be tolled indefinitely unless the defendant actively "conceal[s] the facts necessary to trigger a Section 16(b) lawsuit."[20] This theory overlooks the footnote in *Whittaker* in which we explained that "[t]he failure to disclose in § 16(a) reports, whether intentional or inadvertent, is deemed concealment, thus triggering the traditional equitable tolling doctrine of

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[20] This approach was advocated by Judge Jacobs of the Second Circuit in *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203, 208 n.5 (2d Cir. 2004) (Jacobs, J., concurring) ("The author of this opinion ... would have preferred to say that the statute of limitations in Section 16(b) is equitably tolled only when the failure to file is intentional or unreasonable.").

fraudulent concealment." *Id.* at 527 n.9. That conclusion was further bolstered by our emphasis on creating a rule that can be "mechanically calculated from objective facts," *id.* at 529, which would be undermined if courts were required to conduct case-specific inquiries into the insiders' state of mind about their failure to file Section 16(a) reports.

Third, the Defendants contend that *Whittaker* does not apply in this case because the Underwriters are exempt from Section 16(a) reporting requirements under the SEC's under-writing and market-making exemptions. However, this argument finds no support in *Whittaker*'s bright-line rule. *See Whittaker*, 639 F.2d at 527 & n.9, 530. In any event, were we to follow the Defendants down this line of argument, we would soon find ourselves deciding the substantive merits of the parties' dispute. The question of whether or not the Underwriters are exempt from filing Section 16(a) reports is identical to the question of whether they may be held liable under Section 16(b). We refrain from adopting an approach that "would merge the tolling doctrine with the substantive wrong ...." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000).

Finally, the Defendants argue that *Whittaker* does not apply because it involved a *corporation* that was seeking disgorgement, rather than an *outside shareholder* as in the instant case. They assert that we should adopt different lines of analysis depending on whether the plaintiff is an issuing company or is an outside shareholder such as Simmonds. However, our decision in *Whittaker* created a blanket rule that applies in *all* Section 16(b) actions. A key component of our reasoning was that Section 16(a) notices allow the company's shareholders—who "are likely to be outsiders, minority holders"—to obtain the information necessary to bring a Section 16(b) action. *Whittaker*, 639 F.2d at 528. Nothing in *Whittaker*'s logic or reasoning would allow us to distinguish between issuing companies and outside shareholders, and we refrain from adopting such a strained interpretation of our precedent.

[15] In short, the fundamental holding of *Whittaker* is that Section 16(b)'s two-year statute of limitations begins to run from the time that the defendant files a Section 16(a) disclosure statement. Because Simmonds alleges that the Defendants did not file any Section 16(a) reports, we conclude that Simmonds's claims are not time-barred. Accordingly, the district court's decision on this ground is reversed.

C. Cross-Appeal

In their cross-appeal, the Underwriters contend that the district court erred by dismissing the thirty cases involving the Moving Issuers without prejudice on account of Simmonds's inadequate demand. They argue that these dismissals should have been with prejudice because Simmonds's claims are time-barred. Although we disagree that Simmonds's claims are time-barred, we agree that the district court should have dismissed the thirty Complaints against the Moving Issuers with prejudice on account of her failure to satisfy the Section 16(b) demand requirement in those cases.

[16] We have previously held that a complaint may be dismissed with prejudice on account of the plaintiff's failure to satisfy the demand requirement, *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 990-91 (9th Cir. 1999), *abrogated on other grounds*, *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322-24 (2007), and various other circuits have reached the same conclusion.[21] Although the district court dismissed Simmonds's thirty Complaints against the Moving Issuers "without prejudice," our decision to convert the dismissal is not unprecedented. In a derivative action in which the shareholder failed to show demand futility, the First Circuit *sua sponte* converted the district court's dismissal from "without prejudice" to "with prejudice." *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973). The court explained that the plaintiff was barred from relitigating the issues decided in that action, and accordingly the dismissal should have been entered with prejudice rather than without. *Id*.

[17] We agree with the First Circuit's approach in Kauffman. Simmonds is barred from relitigating issues relating to the adequacy of the demand letters she sent to the thirty Moving Issuers and the follow-up letters she sent to twenty-five of the Moving Issuers. As with any issue litigated fully on merits,

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[21] *E.g., Kanter v. Barella*, 489 F.3d 170, 175 (3d Cir. 2007) (dismissal with prejudice and without leave to amend); *Starrels v. First Nat'l Bank of Chicago*, 870 F.2d 1168, 1169, 1172 (7th Cir. 1989) (dismissal with prejudice and without leave to amend); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 62, 69 (D.C. Cir. 1988) (dismissal with prejudice and without leave to amend); *Shlensky*, 574 F.2d at 141-42 (dismissal without leave to amend); *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (dismissal with prejudice).

shareholders may not endlessly relitigate the adequacy of their pre-suit demand. Accordingly, we vacate the district court's order dismissing without prejudice the thirty cases involving the Moving Issuers, and the district court is instructed to dismiss these thirty cases with prejudice.

[18] In the twenty-four cases that were improperly dismissed as time-barred and in which the Issuing Companies did not join the Moving Issuers' Motion to Dismiss, the district court is directed to permit the Underwriters and Issuing Companies to seek dismissal on account of Simmonds's failure to comply with the demand requirement.[22] We note that our discussion in this

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[22] Contrary to the district court's suggestion, *see In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1211, the Underwriters should be permitted to file motions challenging Simmonds's compliance with the demand requirement. *See Shlensky v. Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978) ("it is well settled ... that defendants other than the corporation whose rights the shareholder plaintiffs are seeking to vindicate may successfully raise the defense of failure to comply with Rule 23.1" and the demand requirement); *accord Hawes v. City of Oakland*, 104 U.S. 451, 461-62 (1881) (complaint dismissed on motion by third party defendant); *Brody v. Chem. Bank*, 517 F.2d 932, 933 (2d Cir. 1975) (per curiam) (complaint dismissed sua sponte).

The Delaware Supreme Court has thoroughly and persuasively explained why third parties have standing to raise defenses based on the shareholder's failure to comply with demand requirement. *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988). "The standing of a third party to assert demand related defenses must be determined, not on the basis of whether such status benefits the interests of the third party, but whether according such status furthers the nature and purpose of the demand requirement." *Id.* The court opinion will almost certainly resolve the twenty remaining cases involving issuers incorporated in Delaware. (We express no opinion regarding the four cases involving non-Delaware issuers.) However, as Simmonds' demands letters to those companies are

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explained (as we discussed supra) that "[t]he purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur." *Id.* Accordingly, the court concluded that third party defendants may challenge the sufficiency of a shareholder's demand. *Id.*

We agree with the reasoning of the Delaware Supreme Court in *Kaplan*, and disagree with the district courts that have held that this result is at odds with the purposes of Section 16(b). *See In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1211 (collecting cases). In light of our general discussion of the demand requirement, we conclude that the Section 16(b) demand requirement—like the demand requirement in all derivative actions—exists for the purpose of allowing corporations to investigate their insiders' wrongdoing, resolve disputes without resorting to litigation, and control any litigation that may take place. *See Kaplan,* 540 A.2d at 730. In addition, we note that the demand requirement of Section 16(b) is a *required* statutory precondition to a shareholder's lawsuit. *See* 15 U.S.C. § 78p(b). As the Delaware Supreme Court explained in *Kaplan*, third parties are permitted to raise demand-related defenses because a shareholder's "right to bring a derivative action does not come into existence until the plaintiff shareholder has made a demand on the corporation to institute such an action." *Id.* We see no reason why such reasoning does not apply in the Section 16(b) context.

Accordingly, in the twenty-four cases being remanded, the district court should follow the general rule under both Delaware law and federal law: any defendant in a Section 16(b) action may challenge the adequacy of the shareholder's pre-suit demand.

not in the record, we leave it to the district court to address those cases in the first instance.[23] We note that four of the cases involve issuers incorporated in jurisdictions other than Delaware (two issuers are incorporated in California, one in Washington, and one in Bermuda). We direct the district court to analyze the adequacy of those demand letters in accordance with the choice-of-law principles articulated in *Kamen*—namely, the court should apply the demand requirements of California, Washington, and Bermuda law, unless those requirements "would frustrate specific objectives" of Section 16 and the Exchange Act. *Kamen*, 500 U.S. at 98 (citation, internal quotation marks, and alterations omitted).

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[23] Because consolidated appeals "do not merge into one" for all purposes, Fed. R. App. P. 3 advisory committee's note (1998 amend.), the district court should be careful about invoking the "law of the case" doctrine in the remanded cases involving the twenty issuers incorporated in Delaware that did not join the Moving Issuers' Motion to Dismiss, *see generally*, Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. Pa. L. Rev. 595, 623-25 (1987) (hereinafter Steinman); *cf. State HMO Management, Inc. v. Tingley Systems, Inc.*, 181 F.3d 174, 180 (1st Cir. 1999) (treating consolidated cases "as a single action for res judicata purposes"). However, if Simmonds's demand letters to those twenty Delaware-incorporated issuers are substantially similar to the thirty demand letters examined in this opinion, the district court is bound by *stare decisis* to apply our holding that demand letters such as the thirty letters we have examined are inadequate as a matter of Delaware law. *See* Steinman, *supra*, at 624-25.

CONCLUSION

We **AFFIRM** the district court's conclusion that Simmonds's demand letters to the thirty Moving Issuers were inadequate under Delaware law, **REVERSE** the district court's conclusion that all of Simmonds's claims are time-barred, and **VACATE** the district court's dismissal orders as to the thirty Moving Issuers with instructions that the district court dismiss these thirty cases with prejudice on account of Simmonds's failure to satisfy Delaware's demand requirement. We **REMAND** the remaining twenty-four cases (that is, the cases involving the twenty-four Issuing Companies that did not join the Moving Issuers' Motion to Dismiss) with instructions for the district court to allow the Underwriters and Issuing Companies to file an appropriate motion to challenge the adequacy of Simmonds's demand letters under Delaware, California, Washington, and Bermuda law, unless that law conflicts with Section 16(b). Costs are awarded to the Appellees.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED IN PART.

M. SMITH, Circuit Judge, specially concurring:

The statutory text of Section 16(b) provides that "no such suit shall be brought more than two years after the date such profit was realized." 15 U.S.C. § 78p(b). In my view, "no suit" means no suit, and "two years after the date such profit was realized" means two years after the insider's final profitable transaction, regardless of when—or even if—a Section 16(a) report is filed. The text of the statute sets a firm bar against Section 16(b) suits filed more than two years after the transaction is completed. Accordingly, I agree with the Supreme Court's *dictum* that Section 16(b) "sets a 2-year ... period of repose." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991).

This straightforward textual reading is further confirmed by comparing the language of Section 16(b) with the language of the other statutes of limitations in our securities laws. *See Lampf*, 501 U.S. at 360-61 & nn.5-7. The Court in *Lampf* explained that language such as Section 16(b)'s "no such suit shall be brought" creates periods of repose that are not subject to tolling. *Id.* at 360-61, 363. In addition, the general securities fraud statute of limitations added by the Sarbanes-Oxley Act of 2002, 116 Stat. 801, provides that securities fraud suits "may be brought not later than ... 5 years after such violation." 28 U.S.C. § 1658(b)(2). The Supreme Court recently noted that this provision "giv[es] defendants *total repose* after five years." *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1797 (2010) (emphasis added). There is little meaningful distinction between the language of 28 U.S.C. §

1658(b)(2) and Section 16(b)—one provides that suits "may be brought not later than ... 5 years after such violation," and the other provides that "no such suit shall be brought more than two years after the date such profit was realized." To me, this nearly identical language should "giv[e] defendants total repose" under both statutes. *See Merck*, 130 S. Ct. at 1797.

There are numerous reasons why Congress would elect to create a firm two-year period of repose for Section 16(b) actions. Although there is no direct evidence of Congress's intent, the legislative history has left behind an intriguing clue. When the Senate and House of Representatives passed their respective bills that later became the Exchange Act, the House of Representatives's version did not even provide for a private right of action under Section 16(b), whereas the Senate's version provided a right of action but omitted a statute of limitations. Romeo & Dye, *supra*, § 1.02[3][b][vi]. It is reasonable to infer that the House negotiators, in reaching a compromise with the Senate over the inclusion of a private right of action, might have bargained to include a stringent statute of limitations to circumscribe that right of recovery.

Admittedly, the legislative history is inconclusive, but a restrictive statute of limitations is eminently logical. Section 16(b) imposes an inflexible penalty on corporate insiders even if they are not at fault and third parties are unharmed. As Section 16(b)'s critics have noted, its disgorgement provision "is little more than a trap for the unwary." *Id.* § 9.01[11][a]. It makes no sense to allow individuals to be hauled into court years—or even decades—after they unintentionally violate Section 16. Our holding in *Whittaker* creates the possibility that "a claim that affects long-settled transactions might hang forever over honest persons." *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203, 208 n.5 (2d Cir. 2004) (Jacobs, J., concurring). *Whittaker* could lead to the anomalous situation in which a corporate officer who mistakenly calculates the six-month short-swing period can be compelled to disgorge his trading profits decades after the fact, whereas a culpable officer who engages in fraudulent insider trading becomes immune from civil suit after five years as long as his trades were spaced more than six months apart. I fail to see the logic behind such a result, and I fear that *Whittaker* failed to foresee such anomalies.

I note that *Whittaker* was motivated by the well-intentioned concern that corporate insiders could avoid Section 16(b) liability if they flout Section 16(a)'s reporting requirements. However, I do not believe that this concern warrants the creation of never-ending liability for corporate directors, officers, and shareholders. The Exchange Act is a comprehensive statute that was designed to address various types of wrongdoing. It is inappropriate for us to use Section 16(b), which prohibits certain types of insider trading, to enforce the policies of Section 16(a), which requires disclosure of insider trading. The Exchange Act creates more than adequate enforcement mechanisms for enforcing Section 16(a)'s disclosure requirements. If the insiders do not file their reports, they may be held professionally, civilly, or criminally liable for failing to do so. *See, e.g.*, 15 U.S.C. § 78ff(a) (criminal penalties); *In re Gold*, Exchange Act Release No. 34-

51585, 85 S.E.C. Docket 724 (Apr. 20, 2005) (professional and civil penalties). And if the insiders withhold their Section 16(a) reports in order to profit from inside information, they may be subjected to Rule 10b-5 securities fraud actions. *See, e.g., In re Daou Sys., Inc.*, 411 F.3d 1006, 1022-24 (9th Cir. 2005).

Ultimately, I believe that *Whittaker*'s cure is worse than the disease it intended to address. I would have preferred to adopt any one of the three alternatives to *Whittaker*: the statute of repose approach, *Lampf*, 501 U.S. at 360 n.5, the actual notice approach, *Litzler*, 362 F.3d at 208, or the hybrid approach that tolls the statute in cases of "fraud or concealment," *id.* at 208 n.5 (Jacobs, J., concurring). Of these three approaches, the statutory text and statutory structure clearly point toward the repose approach. Were it not for *Whittaker*, I would hold that Section 16(b) suits may not be brought more than two years after the short-swing trades take place.

Despite these concerns, I am compelled to follow *Whittaker*. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). Accordingly, I concur with the panel's decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Caption omitted]

ORDER

The Opinion filed on December 2, 2010 is amended to appear as set forth below in the Amended Opinion filed concurrently with this Order.

On slip opinion page 19110, footnote 5, lines 5 and 6, "Digimarc Corporation;" is deleted.

On slip opinion page 19110, footnote 5, line 8, "Openwave Systems Inc.;" is deleted.

On slip opinion page 19124, lines 16 through 27, the text beginning with "If Simmonds lacked access to necessary information" through the end of the paragraph is deleted and replaced with the following: "Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation, and this rule is not clearly incompatible with Section 16 and the Exchange Act."

On slip opinion page 19124, line 28, through page 19125, line 11, the paragraph is deleted in its entirety.

With this amendment, the panel has unanimously voted to deny Appellees' petition for panel rehearing. Judges Thomas and M. Smith have voted to deny Appellant's petition for rehearing en banc, and Judge Hogan has so recommended. Judge Thomas has voted to deny Appellees' petition for rehearing en banc, and Judge Hogan has so recommended. Judge M. Smith has voted to grant Appellees' petition for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on them. Fed. R. App. P. 35.

The petition for rehearing and petitions for rehearing en banc are DENIED. No further petitions for rehearing may be filed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: SECTION 16(B) LITIGATION	MASTER CASE NO. C07-1549JLR ORDER DISMISSING CASES

I. INTRODUCTION

Before the court are 54 derivative shareholder actions brought by one shareholder, Plaintiff Vanessa Simmonds. The cases are based on the theory that Defendants engaged in insider trading during the late-1990s and early 2000 during which there was an increase in private companies going public. Ms. Simmonds sued the underwriters that were responsible for underwriting the Initial Public Offerings ("IPOs") for many of these companies (hereinafter the "Underwriter Defendants"), whose duties included setting an IPO price for the shares.[1]

[1] An IPO is a financing tool companies use to raise capital through equity rather than debt. An issuing company, also referred to as "the issuer," can earn equity capital by selling its shares to a large number of public investors. This process of raising capital is commonly referred to "going public" or an "initial public offering."

Ms. Simmonds also names, as nominal defendants, the companies themselves (hereinafter the "Issuer Defendants"). She asserts a claim for violation of Section 16(b) of the Securities and Exchange Act of 1934 (the "Act") against each of the Underwriter Defendants. She contends that during the underwriting process the Underwriter Defendants made agreements with other insiders and certain investors in order to profit from under priced IPOs.

Before the court is a motion to dismiss pursuant to Rule 12(b)(1) filed by 30 of the 54 Issuer Defendants in C07-1549 (Dkt. # 56); an omnibus motion to dismiss filed by all of the Underwriter Defendants in C07-1549 (Dkt. # 57); and supplemental individual motions to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47), Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33), and Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39).[2] The Issuer Defendants' motion to dismiss (Dkt. # 56) presents the threshold question whether Plaintiff Vanessa Simmonds has standing to bring these derivative claims because she failed to make an adequate demand on the Issuer Defendants before instituting these actions.[3] In the Underwriter Defendants'

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[2] Unless noted otherwise, all docket references are to the master docket found at *Simmonds v. Credit Suisse Sec., et al.*, C07-1549.

[3] It is unclear why only 30 of the 54 Issuer Defendants joined in the motion to dismiss. This may be the result of the remaining 24 Issuer Defendants believing that Ms. Simmonds has standing based on the information she provided to those Issuer Defendants. The court questioned Issuer Defendants'

omnibus motion, as well as part of the Issuer Defendants' motion, the Defendants ask the court to determine whether the statute of limitations for bringing these Section 16(b) claims has expired. The remaining supplemental motions seek dismissal of Ms. Simmonds' complaints against certain Issuer Defendants bringing motions for lack of standing based on separate sets of facts. For the reasons stated below, the court GRANTS in part and DENIES in part the motions as follows:

- The court GRANTS the motion to dismiss filed by 30 of the Issuer Defendants in C07-1549 (Dkt. # 56). The court dismisses the complaints in the following cause numbers without prejudice: C07-1549; C07-1567, C07-1570, C07-1571, C07-1572, C07-1573, C07-1576, C07-1584, C07-1587, C07-1588, C07-1589, C07-1590, C07-1594, C07-1595, C07-1597, C07-1598, C07-1605, C07-1623, C07-1624, C07-1629, C07-1631, C07-1633, C07-1637, C07-1652, C07-1653, C07-1654, C07-1655, C07-1666, C07-1667, C07-1669;
- The court GRANTS the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the remaining 24 cases: C07-1566, C07-1568, C07-1569, C07-1575, C07-

liaison counsel at oral argument on this issue but liaison counsel did not know why only 30 of the Issuer Defendants joined in the motion.

1577, C07-1578, C07-1579, C07-1580, C07-1581, C07-1582, C07-1583, C07-1585, C07-1593, C07-1626, C07-1627, C07-1628, C07-1630, C07-1632, C07-1634, C07-1635, C07-1636, C07-1638, C07-1668, C07-1670. The court dismisses these complaints with prejudice;

- The court DENIES the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the Issuer Defendants seeking dismissal for lack of subject-matter jurisdiction in Dkt. No. 56 from above. These motions are MOOT in light of the court's ruling on the Issuer Defendants' motion to Dismiss (Dkt. # 56);
- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47) as MOOT;
- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33) as MOOT; and
- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39) as MOOT.

II. BACKGROUND

This case involves Section 16(b) of the Act which prohibits short-swing stock transactions by insiders. It also involves IPOs that took place approximately

10 years ago. Section 16(b) establishes strict liability for insiders (i.e., officers, directors, or beneficial owners of more than ten percent of a companies [sic] stock) who purchase and sell securities within a six-month period. An insider found liable under Section 16(b) must disgorge any profits made from any of these sales and purchases—referred to as "short swing profits." Section 16(b) also contains a demand requirement. The demand requirement sets forth the basis by which a shareholder may obtain standing to sue on behalf of the corporation. The shareholder is required to first demand that the corporation bring the lawsuit; if the corporation declines to bring suit, the shareholder may initiate a derivative suit on behalf of the corporation.

Between October 2 and October 12, 2007, Ms. Simmonds filed 55 separate complaints against the Defendants alleging violations of Section 16(b).[4] The cases were consolidated for pretrial purposes before this court (Dkt. # 2). Ms. Simmonds, a college student, brought the related derivative complaints in her capacity as a shareholder of the Issuer Defendants, all are companies that conducted initial public offerings ("IPOs") between late 1999 and early 2000. (*See, e.g.*, Onvia Compl. (Dkt. # 11) ¶ 9.) The complaints allege that certain investment banks, the Underwriter Defendants, violated Section 16(b)'s prohibition on short-swing transactions because they allegedly profited from aftermarket transactions

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[4] One of the 55 cases originally filed, *Simmonds v. Covad*, CV07-1625, was voluntarily dismissed on April 25, 2008 (Dkt. # 18).

executed by investors to whom they allocated IPO shares. (*See, e.g., id.* at ¶ 23.) Each complaint is based on similar factual allegations and asserts only one cause of action for violation of Section 16(b).

The alleged factual basis for each of Ms. Simmonds' complaints is that the Underwriter Defendants colluded with insiders of the Issuer Defendants and certain investors in order to personally profit from underpriced IPOs. (Resp. (Dkt. # 58) at 2 ("The Underwriters' insider status is based upon a recurring pattern of coordinating with key insiders.")) These same allegations appeared in an earlier consolidated case involving these Underwriter Defendants and almost all of the Issuer Defendants, *see In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 293-94 (S.D.N.Y. 2003) ("*In re IPO*") (alleging fraud pursuant to Rule 10b-5 of the Securities Exchange Act of 1934), and in a number of other lawsuits around the country based on other theories of liability arising out of the same or similar allegations. In the *In re IPO* master complaint, the investor plaintiffs allege that the Underwriter Defendants, investment banks entrusted with valuing and underwriting IPOs, orchestrated a vast scheme to defraud the investing public during the late 1990s IPO boom. *Id.* The alleged scheme took place between January 1998 and December 2000 and involved the IPOs of approximately 300 high technology and Internet-related companies. *Id.* The *In re IPO* plaintiffs filed over 1,000 complaints against the Underwriter Defendants and other insiders in 2001, which were later consolidated in *In re IPO*. *Id.*

The *In re IPO* plaintiffs alleged a fraudulent scheme both far reaching and complex in scope. Even the alleged damage resulting from the scheme is difficult to quantify and involves unwritten understandings relating to profit-sharing between the investment banks and their customers. The crux of the plaintiffs' theory in that case is that the investment banks responsible for underwriting the 1998-2000 IPOs at issue required their investing customers to agree to purchase additional shares of a company's stock in the aftermarket in order to receive shares in the company's IPO. *Id.* at 294. The opportunity to purchase IPO stock was important to the banks' customers because, as alleged by plaintiffs, the average first day gain on an IPO stock was just over 60% for all IPOs during the 1998-2000 period and almost 140% for the specific IPOs at issue in *In re IPO*. *Id.* at 294 n.2. The In re IPO plaintiffs also allege that some of the investment banks required that their customers pay them a portion of the profits they made by selling the IPO shares in the aftermarket.[5] *Id.* All of the allegations regarding profit-sharing and market manipulation by the investment banks were made public and likely known to most of the shareholders of these companies as early as 2001.

[5] Judge Scheindlin's February 19, 2003 order on defendants' motion to dismiss in *In re IPO*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003), provides a detailed explanation of the alleged market manipulation and fraudulent scheme surrounding the 1998-2000 IPO market, as well as a historical perceptive on the financial climate leading up to this period.

In the instant case, Ms. Simmonds filed her complaints for short-swing transactions based on the same set of facts as presented in *In re IPO*, albeit under a new theory of liability and almost six years later. Specifically, Ms. Simmonds claims that the Underwriter Defendants are liable for short-swing profits allegedly made in violation of Section 16(b) because the Underwriter Defendants were statutory insiders of the issuing companies and profited from their customers' short-swing transactions that involved stock of the issuing companies. (*See, e.g.*, Onvia Compl. ¶¶ 19-20.)

First, Ms. Simmonds contends that the Underwriter Defendants were statutory insiders because they beneficially owned more than 10 percent of the issuing companies' stock. (*See, e.g., id.* at ¶ 19.) Even if they owned less than 10 percent of the stock directly, she claims that they also shared beneficial interest in stock owned by directors, officers, and other significant shareholders (*i.e.*, insiders) of the issuing companies because they entered into lock-up agreements[6] and agreed to price IPO shares at a small fraction of what they knew to be the likely aftermarket price. (*See, e.g., id.* at ¶¶ 16-17.)

Second, Ms. Simmonds alleges that the purchases and sales involving issuer stock occurred within a

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[6] "These lock-up agreements provided that, subject to limited exceptions, the stockholder could not offer, sell, contract to sell, pledge or otherwise dispose of any Onvia common stock or securities for a period of 180 days after the effective date of the IPO." (Onvia Compl. ¶ 16.)

period of less than six months by referring to the sales as occurring in the "immediate aftermarket" of the IPO. (*See, e.g., id.* at ¶ 20.) She also notes the large discrepancy between the amount investors paid for the IPO stock and the amount at which the investors sold the stock in the immediate aftermarket. (*See, e.g., id.* at ¶ 18 ("The 9.2 million shares of [issuer] stock sold in connection with its IPO raised $197.7 million for [the issuer] - less than one-third of what buyers paid for [the issuer] shares in the immediate aftermarket.")).

Third, Ms. Simmonds claims that the Underwriter Defendants had a pecuniary interest in these transactions because they "shar[ed] in the profits of the customers to whom they made IPO allocations of [issuer] stock." (*See, e.g., id.* at ¶ 20.) She also asserts that the Underwriter Defendants allegedly had a pecuniary interest in these short-swing profits because they allocated "shares of [issuer] stock to executives and other high-level insiders of other companies, both private and public, from which [they] expected to receive new or additional investment banking business in return" and created "the opportunity for other [issuer insiders] to derive personal financial benefits from the sale of [issuer] stock into an inflated market, in an effort by [them] to obtain future investment banking business from [the issuer]." (*See, e.g., id.*)

The Defendants move to dismiss Ms. Simmonds' claims on various different theories. Some of the Issuer Defendants joined in a motion seeking to dismiss the complaints against them arguing that (1) Ms. Simmonds lacks standing to pursue these claims because her demand letters were boilerplate and lacked the requisite specificity and (2) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims. The Underwriter Defendants move separately to dismiss the 54 complaints on the following bases: (1) the Underwriter Defendants do not meet the two-prong test for pleading "beneficial ownership;" (2) the allegations that the Underwriter Defendants had a pecuniary interest in the issuer stock are insufficient; (3) Ms. Simmonds fails to plead a specific purchase or sale within a six-month period; (4) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims; (5) the Underwriter Defendants are shielded from Section 16(b) liability by the underwriter's exemption;[7] (6) the Underwriter Defendants are shielded from Section 16(b) liability by the market-making exemption;[8] and (7) Ms. Simmonds fails to

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[7] The underwriter's exemption generally provides that "[a]ny purchase and sale, or sale and purchase, of a security that is made in connection with the distribution of a substantial block of securities" is exempt from Section 16 requirements. 17 C.F.R. 240.16a-7.

[8] Section 16(d) provides an exemption for short-swing profits made in the ordinary course of business and incident to market-making activities. 15 U.S.C. § 78p(d). In order to maintain a market for securities not traded on a central exchange, "designated broker-dealers operate as 'market makers' in the over-the-counter markets, buying and selling as principals for their own account rather than as agents for their customers." 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 14.10[2] (4th ed. 2004). Acting as a principal, the market-maker sells stock to investors and buys stock from

plead lack of good faith with particularity. Intersil Corporation ("Intersil") moves to dismiss the complaint against it on the basis that Ms. Simmonds failed to ensure that it received her demand letter. Issuer Defendants Audible Inc. ("Audible") and Packeteer Inc. ("Packeteer") move to dismiss the complaints against them on the basis that both companies were subject to a cash-out merger or acquisition shortly after Ms. Simmonds filed her complaints against them.

III. ANALYSIS

A. Statutory Framework

1. Strict Liability for Short-Swing Profits Under Section 16(b)

Section 16(b) provides that a corporation may recover profits realized by corporate insiders from the purchase and sale of securities that occur inside a six-month period (so-called "short-swing trades"). 15 U.S.C. § 78p(b). Section 16(b) provides, in relevant part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer ... shall inure to and be recoverable by the issuer, irrespective of any

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investors, often adding a "mark-up" to the price as its compensation. *See Shivangi v. Dean Witter Reyonlds, Inc.*, 825 F.2d 885, 887 (5th Cir. 1987).

> intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security .... Suit to recover such profit may be instituted . . . by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized.

15 U.S.C. § 78p(b).

Should the issuing corporation fail or refuse to bring such suit, a security holder may bring a derivative action on the corporation's behalf. *Id.* The purpose of Section 16(b) is to discourage corporate insiders from taking advantage of their access to non-public information by imposing a flat rule that prohibits an entire category of six-month purchase and sale transactions. *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 234 (1976). The statute imposes strict liability on insiders who engage in short-swing trades without regard to the insider's intent. *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 430-31 (1972); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121-22 (2d Cir. 2001).

Corporate insiders subject to Section 16(b)'s prohibition of short-swing trading include officers, directors, and "beneficial owners," the latter of which is defined as a "person" holding ten percent of the issuing corporation's securities. 15 U.S.C. § 78p(a). If two or more persons form a "group," each group member may be liable under Section 16(b) if the group's holdings exceed ten percent in the aggregate. 17 C.F.R. § 240.16a-1(a)(1)(2); *see also Rosen v. Brookhaven Capital Mgmt Co., Ltd.*, 113 F. Supp. 2d 615, 618-20 (S.D.N.Y. 2000) (discussing Section 16(b) group liability as borrowed from the group definition for disclosure requirements under Section 13(d), 15 U.S.C. § 78m(d)(3)).

In passing Section 16, "Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public. By trading on this information, these persons could reap profits at the expense of less well informed investors." *Foremost*, 423 U.S. at 243. The ultimate purpose of Section 16 is to prevent the unfair use of information obtained by an insider through his or her relationship to the issuer. 15 U.S.C. § 78p(b). Courts refer to Section 16's provisions as "prophylactic measures" that protect against insider abuse by prohibiting all transactions in which the possibility of abuse is believed to be intolerably great, even if there is no proof of actual abuse. *See Reliance*, 404 U.S. at 422. Although Congress addressed some aspects of insider abuse through other remedies, the scope of Section 16 is not affected by the existence of alternative sanctions. *Foremost*, 423 U.S. at 255.

Under Section 16(b), a corporation, or a security holder via a derivative action, may recover profits realized by an insider subject to Section 16(a). 15 U.S.C. § 78p(b). The action must be brought within two years of the transaction. *Id.* If the insider fails to disclose a covered transaction in the required Section 16(a) reports, the two-year limitation period may be tolled with respect to the non-disclosed transaction. *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 530 (9th Cir. 1981).

In sum, Section 16(b) liability attaches if a plaintiff proves: (1) a purchase, and (2) a sale of securities, (3) by an officer, director, or beneficial owner of more than ten percent of the issuer's securities, (4) within a six-month period. *Gwodzdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

2. Reporting Requirements of Section 16(a)

At the time of the disputed transactions in this case, Section 16(a) required insiders to disclose their initial ownership interests and subsequent changes thereto, within ten days of a transaction. 15 U.S.C. §§ 78p(a)(B)-(C)(2001).[9] Initial statements of ownership interest are reported on Form 3 while changes in ownership interest are reported on Form 4.[10] 17 C.F.R. § 240.16a-3(a). Section 16(a)'s publicity requirement is designed to afford indirect protection against potential misuses of inside

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[9] In 2002, Congress passed the Sarbanes-Oxley Act, which, in part, amended Section 16(a) to now require insiders to electronically disclose changes in their equity interest "before the end of the second day on which the subject transaction has been executed." 15 U.S.C. § 79p(a)(2)(C).

[10] Under Form 4, a beneficial owner subject to Section 16(a) reporting requirements must report *each transaction* in which the owner has a pecuniary interest including the owner's proportionate interest in transactions conducted by another entity. Each transaction must be reported on a separate line. Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 25254, 48 S.E.C. Docket 216 (February 21, 1991).

information. *Foremost*, 423 U.S. at 255-56. Congress recognized that stockholder trading is also subject to abuse when the size of the stockholder's ownership affords the potential to access corporate information. *Id.* Accordingly, an insider subject to Section 16(a) reporting requirements includes a beneficial owner of more than 10 percent of a class of registered equity securities as well as directors and officers. 15 U.S.C. § 78p(a)(1).

B. Issuer Defendants' Motion to Dismiss

The Issuer Defendants move to dismiss 30 of Ms. Simmonds' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1). Rule 12(b)(1) permits the court to dismiss a claim for lack of subject matter jurisdiction based on standing. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). A jurisdictional challenge under this provision may be made on the face of the pleadings or by presenting extrinsic evidence. *Id.* at 1139. When resolving jurisdiction depends on the merits of a case, a court may not resolve genuinely disputed facts. *Id.* Instead, the court must "assume[ ] the truth of the allegations in a complaint ... unless controverted by undisputed facts in the record." *Id.* (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)). At this stage of pleading, the non-moving party needs only to show that the facts alleged, if proved, would confer standing. *Id.* at 1140 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998)). Dismissal is only appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 44-46 (1957)).

In their joint motion to dismiss, 30 of the Issuer Defendants claim that the demand letters, and the follow-up letters, sent by Ms. Simmonds were inadequate. The Issuer Defendants argue that Ms. Simmonds lacks standing to bring a Section 16(b) action because she failed to sufficiently demand that they bring suit against the Underwriter Defendants before she filed this derivative action. The parties agree that Ms. Simmonds sent letters to the issuing companies' boards of directors demanding that they bring suit under Section 16(b) against the Underwriter Defendants. The moving Issuer Defendants, however, claim that the demands were insufficient because they failed to (1) properly identify company insiders, (2) describe the factual basis of the wrongful acts, and (3) describe the alleged short-swing profits.

Ms. Simmonds argues that the demands were sufficient because she was not required to provide the companies with specific allegations when she was not privy to all the necessary information. Ms. Simmonds further contends that the Issuer Defendants had notice of her theory of the case because she sent follow-up letters that referred to "laddering" and "spinning."[11]

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[11] Laddering is a term used to describe the situation wherein an underwriter induces "investors to give orders to purchase shares in the aftermarket at pre-arranged, *escalating prices* in exchange for receiving IPO allocations." Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Exchange Act Release No. 34-51500, 70 Fed. Reg. at 19672-01 (April 13, 2005) *Id.*, at 142-43 (internal quotations omitted) (emphasis in original). Spinning refers to

The question of the adequacy of Ms. Simmonds' pre-lawsuit demand is one of standing. Without standing, the court lacks subject-matter jurisdiction over these cases and must dismiss them without reaching the merits. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). But *see Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (finding that the district court's assumption of Article III standing did not violate the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits). In this instance because only 30 of the 54 Issuer Defendants attacked Ms. Simmonds' standing and provided sufficient information for the court to evaluate the challenge, the court only considers the standing issue with respect to the moving Issuer Defendants.

1. Adequacy of Demand Letters

The Issuer Defendants claim that Ms. Simmonds failed to meet the demand requirement pursuant to Section 16(b). Although no Ninth Circuit case law directly addresses this point, other federal courts have held that only the issuing corporation has standing to object to any deficiency in, or even the total absence of, a shareholder's demand. *See Dreiling v. Am. Express Travel Related Serv. Co. Inc.*, 351 F. Supp. 2d 1077, 1084 (W.D. Wash. 2004) *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006); *see also Colan v. Monumental Corp.*, 524 F. Supp. 1023,

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the underwriters' distribution of IPO shares to high-level insiders of other companies expecting to obtain future underwriting business in return. *See* Hazen, supra, § 6.3[2].

1028 (N.D. Ill. 1981); *Prager v. Sylvestri,* 449 F. Supp. 425, 429 (S.D.N.Y. 1978).

While Section 16(b) creates the requirement for a demand, Federal Rule of Civil Procedure 23.1 is the procedural manifestation of the state law of corporate governance regarding the right of a shareholder to bring a derivative suit on behalf of a corporation. *Dreiling*, 351 F. Supp. 2d at 1085; *Levner v. Al Saud*, 903 F. Supp. 452, 456 (S.D.N.Y. 1994). Rule 23.1 states that the complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority." Fed. R. Civ. P. 23.1. In each of her complaints, Ms. Simmonds describes the demand letters she sent to each of the issuing companies. The substantive question of whether the demand letters are sufficient is governed by the law of the state of incorporation. *Dreiling*, 351 F. Supp. 2d at 1085; *Levner*, 903 F. Supp. at 456. All of the moving Issuer Defendants are incorporated in Delaware.[12]

Under Delaware law, a demand made upon the board of directors must at least "identify the alleged wrongdoer, describe the factual basis of the wrongful acts, the harm caused to the corporation, and request remedial relief." *Dreiling*, 351 F. Supp. 2d at 1085 (quoting *Levner*, 903 F. Supp. at 456). The shareholder generally does not need to specify the

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[12] All of the remaining Issuer Defendants are also incorporated in Delaware except for two Issuer Defendants that are incorporated in California, one that is incorporated in Washington and one in Bermuda.

legal theory, or every fact in support of that theory, but does need to specify the facts demonstrating the wrongful act. *Levner*, 903 F.Supp. at 456. The court in *Dreiling* found that the demand was substantively sufficient because it provided notice to the issuing company of who the alleged wrongdoers were, what the alleged wrong was, and the requested relief. 351 F. Supp. 2d at 1085. In the demand letter, the plaintiff informed the board that "American Express Company (directly or through it subsidiaries) sold substantial amounts of [the issuing company's] stock from February 25, 2000 through August 24, 2000, thereby violating Section 16(b)'s prohibition against short-swing trading by company insiders" and "demand[ed] that the Board of Directors prosecute claims against American Express Company for violations of Section 16(b)." *Id.* Even though American Express Company had many subsidiaries, the court determined that the shareholder sufficiently identified the wrongdoer, wrongful acts, and company harm in its demand letters. *Id.* Moreover, the court found that the shareholder adequately requested remedial relief by demanding that the board compel the alleged insider to disgorge its profits under Section 16(b). *Id.*

Similar to the demand letters in *Dreiling*, the demand letters in this case sufficiently identify the alleged wrongdoers by demanding that the issuing company bring suit against its lead IPO underwriters. Unlike the demand letters in *Dreiling*, however, the demand letters here fail to sufficiently identify the factual basis of the wrongful acts, the harm caused to the corporation, and the requested remedial relief. The demand letters sent to the moving Issuer Defendants are nearly identical. The letters describe the alleged wrongful act, damage, and remedial remedy in a single paragraph:

> Notwithstanding the short-swing trading prohibition of Section 16, the group, through its members engaged in purchase and sales of company shares within periods of less than six months during [the one-year relevant period]. Additionally, despite the reporting requirements of Section 16(a), neither the group nor its members filed Section 16(a) reports for these purchase and sale transactions. The group members should therefore be compelled to disgorge the profits they made through the purchase and sales of Company Stock during [the one-year relevant period].

(Issuer's Joint Motion to Dismiss (Dkt. # 56), Ex. D). A few demand letters do identify certain of the Underwriter Defendants involved in the transactions, but describe with similar brevity the alleged wrongful act, damage, and remedial remedy in a single paragraph.

Ms. Simmonds' demand letters do not describe the same alleged wrongdoing that she later describes in her complaints. Unlike American Express in *Dreiling*, the Underwriter Defendants are not alleged to have committed a wrong by merely selling shares they directly owned in less than a six-month period. Instead, in her complaints, Ms. Simmonds contends that the alleged short-swing transactions were not executed by the Underwriter Defendants but by customers to whom the underwriters had allocated IPO shares. She also infers that the alleged damage to the issuing companies was the difference between the amount the shares sold for in the IPO and the amount the shares sold for in the immediate aftermarket. Moreover, according to the complaints, the remedial remedy would be disgorgement of the amount the Underwriter Defendants earned from the customer transactions, and not the customers' profits in their entirety. The demand letters mention none of this and therefore did not put the Issuer Defendants on notice that Ms. Simmonds was demanding that the corporation compel the Underwriter Defendants to disgorge profits they earned when customers to whom they allocated IPO shares sold such shares in the aftermarket.[13]

Ms. Simmonds' demand letters are also insufficient because the factual basis of the alleged wrongful acts is premised upon mere suspicion and lacks the requisite specificity to give the directors a fair opportunity to initiate suit. In *Levner*, the court found that the plaintiff's demand letter was inadequate because it "simply was not adequately particular to alert the [issuing company's] board as to the corporate injury, or the relief sought." 903 F. Supp. at 456. The demand letter in *Levner* set forth the factual basis for the alleged wrongdoing by stating that "[i]n light of [this transfer], plaintiff also requested that [the issuing company] take action with respect to the possibility that [the defendant]

[13] Ms. Simmonds not only fails to identify the remedial nature of her demand but also fails to identify any transaction wherein an Underwriter Defendant shared in the profit of any of its investing customers who sold shares in the aftermarket. The theory is not only novel but based almost entirely on conjecture.

was acting on behalf of others in connection with his purported purchase of [the shares]." *Id.* at 455-56. Similarly, Ms. Simmonds bases her complaint on the mere suspicion that the Underwriter Defendants shared in the profit from the shares their customers sold in the immediate aftermarket. Ms. Simmonds' demand letters, however, do not even share this suspicion with the issuing companies. Instead, she states only generally that the Underwriter Defendants made profits from purchases and sales, without providing the particularity that the board would need in order to make an informed decision about whether to bring a lawsuit. "The purpose behind the demand requirement is to give the directors of a corporation the initial opportunity to redress the wrong." *Id.* at 456. Ms. Simmonds' demand letters are completely lacking in the specificity that would give the directors a "fair opportunity to initiate the action, [that she] subsequently undertook," which is the primary purpose of the demand requirement. *Shlensky v. Dorsey*, 574 F.2d 131, 141 (3d Cir. 1978).

At oral argument on this motion, Ms. Simmonds' counsel suggested that Ms. Simmonds need not provide all the *Levner* information in the demand letter because the information relating to the concerted activity was contained in the SEC complaints and the Issuer Defendants should just "go look in [their] own files" for an explanation of the "Simmonds' theory." (Tr. (Dkt. # 77) at 27 (explaining that the "thing the SEC is unhappy with you about is the set of transactions that forms the basis of our claim.").) Even assuming that telling the corporations to "go look in their own files" to understand the shareholder's theory for a derivative lawsuit is sufficient, Ms. Simmonds nevertheless made no effort to explain to the Issuer Defendants how the conduct that formed the basis of the *In re IPO* litigation also supports a claim for Section 16(b) liability.

When questioned at oral argument regarding the form of relief Ms. Simmonds seeks and whether this relief is explained in the demand letters, Ms. Simmonds' counsel stated that the theory of relief may or may not be described in the demand letters but that, even if it was not, Ms. Simmonds was merely claiming disgorgement of profits. (Tr. at 28.) Ms. Simmonds' counsel then argued that she is simply claiming disgorgement from "short-swing profits from pair trades involving specific purchase and sales [the Underwriter Defendants] know [of] and we don't." (*Id.*) Even this explanation, however, does not adequately explain Ms. Simmonds' theory of relief. As the court interprets her theory, Ms. Simmonds is not claiming the traditional disgorgement of profits from customers who engaged in short-swing trades, but rather disgorgement of profits from underwriters whose clients - who are not insiders - engaged in short-swing trades. Thus, Ms. Simmonds is not seeking disgorgement of the customers' profits from the customer; rather, she seeks disgorgement of profits the underwriters allegedly received from the short-swing trades of their customers. Without analyzing whether this theory is legally cognizable, the court is satisfied that nothing in the demand letters sent to the Issuer Defendants, nor in any of the follow-up letters, explains Ms. Simmonds' multi-layered theory of recovery of profits from short-swing trades.

In her response to the motion to dismiss, Ms. Simmonds points to the additional information that she provided to the issuing companies in follow-up letters. (Resp. (Dkt. # 59) at 8). This additional information, however, only pertains to the "group activity related to 'laddering' and 'spinning' connected to the IPO." (*Id.*) Ms. Simmonds did not provide any further indication to the boards of any of the Issuer Defendants that the purchases and sales that harmed the issuing company were actually made by the Underwriter Defendants' customers. Even considering the additional information provided by Ms. Simmonds, the court finds that Ms. Simmonds failed to give the boards of these companies a sufficient factual basis of the wrongful conduct alleged (*i.e.*, the nature of the purchase and sales), the harm done to the company, or the remedial remedy she seeks. If Ms. Simmonds was simply claiming that the Underwriter Defendants directly owned shares and sold them in violation of Section 16(b), the demand letters would probably suffice. As Ms. Simmonds' complaints illustrate, however, her claims are much more complex and novel, requiring a higher level of specificity to put the boards on notice. Although Ms. Simmonds is correct in arguing that she is not required to identify each specific transaction, she is required to disclose, at minimum, the factual basis for her claims.

Finally, Ms. Simmonds argues that she was not required to make demands upon the issuing companies' boards because such demands would be futile. Under Delaware law, once a shareholder plaintiff makes a demand upon the directors before filing suit, he or she loses the ability to claim demand futility. *Levner*, 903 F.Supp. at 456.

Because Ms. Simmonds' demands are insufficient under Delaware law and Rule 23.1, the court dismisses her complaints without prejudice. The court will not permit Ms. Simmonds to amend her demand letters while pursuing this action. *See Shlensky*, 574 F.2d at 142 (citing *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir. 1973) ("[T]o hold that demands to satisfy Rule 23.1 may be made on the directors *after* a derivative suit has been initiated would be to reduce the demand requirement of the rule to a meaningless formality.")). The purpose of the demand is to afford the corporation the opportunity to address the alleged wrong without litigation, to decide whether to invest corporate resources, and to control any litigation that does occur. It appears to the court when it considers the carbon-copy form of Ms. Simmonds' 54 demand letters, as well as her vague description of the nature of the alleged wrong, that Ms. Simmonds approached the pre-suit demand requirement as a perfunctory task before instituting these actions and pursuing her novel theory of liability. Accordingly, the court must dismiss the complaints against the 30 moving Issuer Defendants without prejudice.[14]

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[14] The remaining 24 Issuer Defendants have not moved to dismiss Ms. Simmonds' complaints for failure to satisfy the pre-suit demand requirement. The court is unable to dismiss the remaining complaints on this basis alone. Although the court may assume that Ms. Simmonds provided the same description of her theory regarding the alleged short-swing transactions to the remaining 24 Issuer Defendants, without something in the record setting forth the extent of information provided to these

C. Underwriter Defendants' Motion to Dismiss

The Underwriter Defendants move to dismiss Ms. Simmonds' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). When considering a motion to dismiss under Rule12(b)(6), the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). The court's review of the record on a Rule 12(b)(6) motion is generally limited to the complaint itself. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The court may, however, rely on facts subject to judicial notice. *States v. Ritchies*, 342 F.3d 903, 908 (9th Cir. 2003). For instance, the court may consider a plaintiff's clarifications in their briefing and at oral argument. *Pegram v. Herdich*, 530 U.S. 211, 230 n.10 (2000) (citing, *Alicke v. MCI Commc'ns Corp.*, 111 F.3d 909, 911 (D.C. Cir. 1997) (citations omitted), in which the court relied on statements in oral argument to clarify complaint).

A court can dismiss an action under Rule 12(b)(6) where the plaintiff fails to allege either a cognizable legal theory or sufficient facts in support of a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a complaint need not contain detailed factual

Issuer Defendants, the court cannot evaluate whether to dismiss the complaints against them for this reason.

allegations, a plaintiff's obligation to provide the grounds entitling him to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, __ U.S. __,127 S. Ct. 1955, 1964-65 (2007) (citations omitted). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* Specific facts are not necessary. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (citations omitted). The complaint need only advise the defendant of what the claim is and the grounds upon which it rests. *Id.* (applying *Twombly* to a complaint alleging a civil rights violation pursuant to 42 U.S.C. § 1981).

As discussed above, the Underwriter Defendants seek to dismiss the remaining 54 complaints on the following bases: (1) the Underwriter Defendants do not meet the two-prong test for pleading "beneficial ownership;" (2) the allegations that the Underwriter Defendants had a pecuniary interest in the issuer stock are insufficient to support a group theory; (3) Ms. Simmonds fails to plead a specific purchase or sale within a six-month period; (4) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims; (5) the Underwriter Defendants are shielded from Section 16(b) liability by the Underwriter's Exemption; (6) the Underwriter Defendants are shielded from Section 16(b) liability by the Market-Making Exemption; and (7) Ms. Simmonds fails to plead lack of good faith with particularity. The court considers the fourth basis—the two-year statute of limitations—dispositive and therefore considers it first.

1. Application of Equitable Tolling

Because only 30 of the 54 Issuer Defendants moved to dismiss Ms. Simmonds' claims based on failure to provide an adequate demand and only the Issuer Defendants have standing to bring such a challenge, the court moves on to address the Underwriter Defendants' motion to dismiss in the remaining 24 cases.

Even though claims under Section 16(b) must be brought within two years after the alleged transaction occurs, the statutory period may be tolled if the beneficial owner fails to report the transaction as required under Section 16(a). *Whittaker*, 639 F.2d 516 at 528. The Underwriter Defendants, as well as the Issuer Defendants, argue that the statute of limitations bars any Section 16(b) claim because the Underwriter Defendants were not subject to Section 16(a) reporting requirements. As discussed further below, the court finds that the Issuer Defendants' shareholders were fully advised of the facts giving rise to Ms. Simmonds' claim well over five years before Ms. Simmonds filed these actions. As such, the court is not persuaded that equity is furthered by tolling the limitations period in these cases.

The Underwriter Defendants contend that the statute of limitations expired because shareholders had the necessary information to assert a Section 16(b) claim more than two years ago. Under the "disclosure" interpretation adopted by the Ninth Circuit, an insider's failure to disclose covered transactions in the required Section 16(a) reports tolls the two-year limitations period connected with such a non-disclosed transaction. *Whittaker*, 639

F.2d at 527. In *Whittaker*, the Ninth Circuit held that the period beings [sic] to run when the transactions are disclosed in the insider's Section 16(a) report. *Id.* The Ninth Circuit rejected the more lenient "notification" approach which triggers the running of the two-year period once the corporation (and thus indirectly the shareholders) has sufficient information to put it on notice of its Section 16(b) claims. *Id.* at 529. Instead, it adopted the disclosure interpretation, in part, to ensure notification to shareholders, but also to recognize Congress' goal "to impose absolute accountability within clearly demarcated boundaries" under Section 16. *Id.*

> This goal of clear boundaries is served by a limitations period which can be mechanically calculated from objective facts. The dates on which purchases and sales are made are such facts, as are the dates on which Section 16(a) reports are filed with the SEC. By contrast, under the notice interpretation, the running of the limitations period would depend on uncertain determinations of what knowledge should lead a corporation to discover its cause of action. Thus, the disclosure interpretation better serves the statute's purpose than the notice interpretation.

Id.

More recently, the Second Circuit allowed the statutory limitations period to run until the company (and shareholders) received actual notice "tantamount to a Form 4" regarding a transaction. *Litzler v. CC Invs. L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004). In adopting an actual notice standard, the Second Circuit recognized that requiring actual notice created uncertainty with respect to otherwise long-settled transactions. *Id.* at 208 n.5. It nevertheless concluded that actual notice better served the goals of Section 16 because it neither required identifying "circumstances in which a person would or should have realized the non-compliance" nor relied on "the ability of a shareholder or company to piece together the substance of a Form 4 from disparate sources of information." *Id.* at 208. The Second Circuit did not divorce equitable tolling from justifiable circumstances completely, however. *Id.* (stating that "[a]ssuming the circumstances are found to justify equitable tolling in this case" then tolling would end on the date by which the plaintiff received actual notice of the claim). Judge Jacobs, writing for the Second Circuit in *Litzler*, cautioned in a footnote that allowing the statute of limitations to be tolled solely because a defendant failed to file Section 16(a) reports would result in indefinite liability, thereby "affect[ing] long-settled transactions [that] might hang forever over honest persons." *Id.* at 208 n.5.

Here, unlike *Whittaker* and other cases employing the equitable tolling doctrine in Section 16(b) cases, there is no dispute that all of the facts giving rise to Ms. Simmonds' complaints against the Underwriter Defendants were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed. The only recent development giving rise to these claims is Ms. Simmonds' acquisition of shares in the 54 Issuer Defendants' companies. Of note, there is no dispute that the shares were acquired at the direction of Ms. Simmonds' father who is a securities lawyer with experience in Section

16(b) litigation. While the court need not consider the steps taken in attempting to establish standing in these cases to determine whether equitable tolling is appropriate, the court does rely on the fact that the only significant development occurring within the last two years was Ms. Simmonds' acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed. This leads the court to seriously question the application of principles of equity to the cases before it.

The definition of equity, *i.e.*, the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances" or the "body of principles constituting what is fair and right," persuades the court that equitable tolling does not apply to the situation before it. BLACK'S LAW DICTIONARY 579 (8th ed. 2004); *see also U.S. ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996) (explaining that equitable tolling is read into every federal statute and that the rationale behind tolling requires that the statute of limitations start to run when the plaintiff acquires knowledge of the wrongful activity). The court indicated its hesitation to apply these principles to Ms. Simmonds' complaints at oral argument. Ms. Simmonds' counsel responded that the court could simply give the doctrine another name. (Tr. at 34.) Changing the nomenclature, however, does not change the court's conclusion that tolling is not appropriate in this case.

While the *Whittaker* court adopted a bright-line test for determining whether a "disclosure" by an insider of the corporation has been made in order to determine the tolling of the statute, the *Whittaker* decision does not resolve whether the statute should be tolled in this case. In *Whittaker*, the court was faced with a much different factual situation. The defendant in *Whittaker*, William Whittaker, was a corporate insider of Whittaker Corporation as was his mother, Beuleh Whittaker. *Whittaker*, 639 F.3d at 518. Mr. Whittaker failed to disclose to the corporation that he had total control over the shares owned by his mother and was thus a beneficial owner of her shares. *Id.* at 523. When the corporation learned the full extent of Mr. Whittaker's control over his mother's shares it compiled a list of short-swing trades using both accounts. *Id.* at 519. It then demanded payment from Mr. Whittaker of the profits he realized from the short-swing trades. *Id.* Mr. Whittaker paid the demand and then sued for a declaration of nonliability under Section 16 and to recover the money he paid. *Id.*

The district court in Whittaker held that Mr. Whittaker was liable for short-swing trades but only those made during the statutory two-year period, which cut out a substantial portion of the corporation's recovery—almost four years of trades were eliminated. *Id.* The Ninth Circuit, under those facts, held that the two-year period was tolled, essentially indefinitely, until Mr. Whittaker filed his Form 4. *Id.* at 530. The Ninth Circuit reasoned that it was providing "absolute accountability within clearly demarcated boundaries." *Id.* This reasoning does not apply in this case. Here, there are no "demarcated boundaries" because the novelty of Ms. Simmonds' theory neither gives the insiders sufficient notice of the possibility of having to file a

Form 4 (*i.e.*, the underwriters should have known that allocating IPO shares to their best customers in return for more business could lead to Section 16(b) liability) nor does it provide any end date of liability for the issuing companies or the underwriters.[15] Indeed, Ms. Simmonds' counsel acknowledged that under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock. The court is not persuaded that permitting shareholders to go back 20 years with novel claims for Section 16(b) liability would further the congressional intent of the statute. Accordingly, the court does not apply equitable tolling to Ms. Simmonds' claims.

IV. CONCLUSION

For the reasons stated, the court GRANTS in part and DENIES in part the motions before it. The court GRANTS the motion to dismiss filed by 30 of the Issuer Defendants in C07-1549 (Dkt. # 56) without prejudice. The court GRANTS the omnibus motion

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[15] The court questioned whether Ms. Simmonds was claiming that she was not "on notice" of the claim because the Underwriter Defendants had not filed their Form 4. Ms. Simmonds' counsel candidly responded that he did not know the answer to that question. He then went on to explain that if she is considered to be on notice, he would go out and find a plaintiff that was not on notice. (Tr. at 32.) This exchange accurately reveals the incongruent result when the bright-line rule set forth in Whittaker is applied to the facts in this case. Until such time as the Underwriter Defendants file a Form 4—essentially admitting liability—the statute is tolled forever.

to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the remaining 24 cases. The court dismisses these complaints with prejudice. The remaining motions are DENIED as MOOT: the supplemental individual motion to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47); the supplemental individual motion to dismiss filed by Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33); and the supplemental individual motion to dismiss filed by Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39).

Dated this 12th day of March, 2009.

/s/
JAMES L. ROBART
United States District Judge

PERTINENT STATUTORY PROVISIONS

Section 16 of the Securities Exchange Act of 1934 provides in relevant part:

Directors, officers, and principal stockholders

(a) Disclosures required

(1) Directors, officers, and principal stockholders required to file

Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission (and, if such security is registered on a national securities exchange, also with the exchange).

(2) Time of filing

The statements required by this subsection shall be filed—

(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title;

(B) within 10 days after he or she becomes such beneficial owner, director, or officer;

(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206(b) of the

Gramm-Leach-Bliley Act (15 U.S.C. 78c note)) involving such equity security, before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

(3) Contents of statements

A statement filed—

(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing under such subparagraph.

(4) Electronic filing and availability

Beginning not later than 1 year after July 30, 2002—

(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

15 U.S.C. § 78p.