No. 10-1261

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,
Petitioners,

v.

VANESSA SIMMONDS,
Respondent.

IN RE SECTION 16(b) LITIGATION

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI*

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***This appeal relates to the appeal previously docketed as No. 10-1218**

May 12, 2011

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QUESTION PRESENTED

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) ("Section 16(b)"), is the only statute enacted by Congress that directly targets insider trading. Congress designed Section 16(b) to promote the public's interest in preserving the integrity of United States financial markets. Section 16(b) is a strict liability scheme. It requires statutory insiders to disgorge profits from short-swing transactions in publicly-traded issuer securities. Congress gave exclusive enforcement authority of Section 16(b) to issuers and their shareholders. It also prescribed a two-year statute of limitations.

Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(a) ("Section 16(a)"), requires statutory insiders to disclose short-swing trading activity in reports filed with the United States Securities and Exchange Commission. These reporting obligations are an integral part of Section 16 enforcement. The information insiders are required to disclose constitutes the main source—typically the only source—of information for the suits Congress authorized shareholders to bring under Section 16(b).

The question presented is: does Section 16(b)'s two-year statute of limitations begin to run if the targeted insider has failed to comply with its Section 16(a) reporting obligations?

LIST OF PARTIES

Pursuant to Rule 14.1(b), below is a list of all parties in the court whose judgment is the subject of this petition:

Plaintiff/Respondent

1. Vanessa Simmonds

Defendants/Petitioners ("Underwriters")

1. Credit Suisse Securities (USA) LLC
2. Goldman Sachs & Co.
3. J.P. Morgan Securities Inc.
4. Merrill Lynch, Pierce, Fenner & Smith Incorporated
5. Bank of America Corporation
6. Robertson Stephens, Inc.
7. Deutsche Bank Securities Inc.
8. Morgan Stanley & Co. Incorporated
9. Citigroup Global Markets, Inc.
10. Bear, Stearns & Co., Inc.
11. Lehman Brothers Inc.

Nominal Parties ("Moving Issuers")

1. Onvia, Inc.
2. Finisar Corporation
3. Ariba, Inc.
4. Akamai Technologies, Inc.
5. Intersil Corporation
6. Avici Systems, Inc.
7. Tivo, Inc.
8. Selectica, Inc.
9. Red Hat, Inc.
10. Vignette Corporation
11. Sycamore Networks, Inc.

12. Silicon Laboratories Inc.
13. Maxygen, Inc.
14. The Street.com, Inc.
15. Sonus Networks, Inc.
16. Priceline.com Incorporated
17. Martha Stewart Living Omnimedia, Inc.
18. Audible, Inc.
19. Capstone Turbine Corporation
20. CoSine Communications, Inc.
21. Perot Systems Corporation
22. AsiaInfo Holdings, Inc.
23. Saba Software, Inc.
24. Digimarc Corporation
25. InterNAP Network Services Corporation
26. Packeteer Inc.
27. Aspect Medical Systems, Inc.
28. NaviSite, Inc.
29. Oplink Communications, Inc.
30. Occam Networks, Inc.

Nominal Parties ("Non-Moving Issuers")

1. Foundry Networks, Inc.
2. Avanex Corporation
3. Turnstone Systems, Inc.
4. Silicon Image, Inc.
5. Juniper Networks
6. Kana Software, Inc.
7. Interwoven, Inc.
8. Openwave Systems, Inc.
9. Informatica Corporation
10. Critical Path, Inc.
11. SourceForge, Inc.
12. Concur Technologies, Inc.
13. Palm, Inc.
14. Brocade Communications Systems, Inc.
15. Microtune, Inc.

16. Extreme Networks, Inc.
17. InsWeb Corporation
18. Marvell Technology Group Ltd.
19. Keynote Systems, Inc.
20. Tibco Software Inc.
21. Transmeta Corporation
22. Airspan Networks, Inc.
23. OmniVision Technologies, Inc.
24. Immersion Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

STATUTORY PROVISION INVOLVED

15 U.S.C § 78p(a), (b)
Section 16 of the Securities Exchange Act of 1934

Section 16. 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.

* * *

(3) Contents of statements

A statement filed--

(A) . . . 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) . . . 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.

* * *

(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 . . . within any period of less than six months . . . 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 . . . . 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***.

(Emphasis added).

STATEMENT OF THE CASE

I. BACKGROUND ON SECTION 16

A. Congress Sought "to Curb the Evils of Insider Trading" and Protect the Integrity of United States Financial Markets Through Exclusive Private Enforcement of Section 16(b).

Section 16(b) of the Securities Exchange Act of 1934 ("the Act") is the only federal statute enacted by Congress specifically "to curb the evils of insider trading." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972). The statute "imposes a strict prophylactic rule with respect to [statutory] insider, short-swing trading." *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 (1976). Statutory insiders include officers, directors, and shareholders with more than a 10 percent interest in the issuing company. 15 U.S.C. § 78p(b). The latter may be formed by a "group" that collectively owns more than 10 percent of an issuer's securities. *Roth v. Jennings*, 489 F.3d 499, 510-16 (2d Cir. 2007).

Statutory insiders are "presumed to have access to inside information." *Foremost-McKesson*, 423 U.S. at 243. When they profit from trades in publicly-traded issuer stock within any six month period ("short-swing trading"), the insiders must disgorge their profits to the issuer. 15 U.S.C. § 78p(b); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973).

Congress did ***not*** give the United States Securities and Exchange Commission ("SEC") ***any*** role in enforcing Section 16(b). *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Congress permitted only private enforcement and relies on private attorneys to spearhead that effort:

> Congress left enforcement of section 16(b) cases to shareholders and consequently to the attorneys who find such cases and represent the shareholders who consent to be plaintiffs. The SEC was given no role in enforcing section 16(b). Thus, section 16(b) can be enforced and the market's integrity can be protected, only if attorneys are willing to invest the time and energy, and assume the risk, that is involved in investigating numerous SEC filings in the search to uncover insiders who make improper short swing profits, and filing lawsuits against those unwilling to return such profits.

Klein v. Salvi, No. 02 Civ. 1862 (AKH), 2004 WL 596109, at *10 (S.D.N.Y. Mar. 30, 2004), *aff'd*, 2004 WL 2931121 (2d Cir. 2004).

B. Section 16(b) Enforcement Requires Section 16(a) Disclosure.

Section 16(a) is integral to Section 16(b) enforcement. Section 16(a) requires insiders to publicly disclose their short-swing securities transactions in order to combat the practices Congress enacted Section 16(b) to prevent. 15 U.S.C. § 78p(a). As described by the SEC:

> Section 16 . . . was designed to provide the public with information on insider securities transactions and holdings and to deter insiders

> from profiting on short term trading transactions in the securities of their corporations on the basis of undisclosed information. The section was enacted primarily in response to abuses, described in detail in the legislative history of the Exchange Act, where insiders with advance knowledge of facts which would produce a rise or fall in the market value of securities of their companies bought and sold such securities as the circumstances warranted to their personal advantage. On occasion, insiders actually manipulated the market price of their stock by causing a corporation to follow financial policies calculated to produce sudden changes in market prices in order to obtain short swing profits. To combat these practices, Congress enacted Section 16 to require reports of securities transactions by insiders and to provide for the recovery of any short swing profits.

Interpretive Release on Rules Applicable to Insider Reporting and Trading, 46 Fed. Reg. 48147-01 (Oct. 1, 1981) (footnotes omitted); *see also Gollust*, 501 U.S. at 121 (describing purpose of Section 16(b) as ensuring "maintenance of fair and honest markets" through elimination of profits from insider, short-swing trading); *Foremost-McKesson*, 423 U.S. at 243-44 (same); *Kern County Land*, 411 U.S. at 592 (same; setting out legislative history).

The "reports" to which the SEC refers are commonly known as "Section 16(a) reports." "The disclosures and reports of § 16(a) are an integral part of the context of § 16 within which § 16(b) must be read." *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 528

(9th Cir. 1981). The information in Section 16(a) reports is the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Id.*; *see also Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 207 (2d Cir. 2004) ("The prophylaxis of Section 16 works by imposing an absolute duty of disclosure" through Section 16(a) reporting). The drafters of Section 16(b) "clearly thought" that the Section 16(a) disclosure requirements also "would afford indirect protection against some potential misuses of insider information." *Foremost-McKesson*, 423 U.S. at 255-56, 257 n.31 (citing legislative history).

Section 16(a) reports contain, *inter alia*, short-swing trading and group membership details. The reports require statutory insiders to disclose:

- The identity of the reporting person.
- Whether the reporting person is an officer, director, or 10 percent shareholder.
- Whether the reporting person is filing individually or as part of a "group."
- The dates of the reported short-swing trades.
- The amounts, prices, and nature of the securities acquired, disposed of, or beneficially owned.

See Appendix A (blank Section 16(a) report); 15 U.S.C. § 78p(a). Section 16(a) reports allow the examining shareholder to discover and isolate the dates of the trades at issue, mathematically compute the short-swing profits to be disgorged, identify the statutory insiders as individuals or groups, and pinpoint the shares in which the insiders have or share "a direct or indirect pecuniary interest." 17 C.F.R. § 240.16a-1(a)(2). Without Section 16(a) reports, outsiders, like Respondent, have no access to this specific short-swing profit and other claim-related information.

None of the targeted insiders in these cases filed Section 16(a) reports. Nor have they ever publicly disclosed Section 16(a) information in any other manner.

II. STATEMENT OF FACTS

A. Respondent's Claim

The investment bank Petitioners ("Underwriters") that served as lead underwriters of initial public offerings ("IPOs") of nominal party issuers ("Issuers") reaped extraordinary profits through short-swing, insider trading of Issuer IPO stock. From 1998 through 2000, the stock market experienced a surge of "hot" IPOs. In these IPOs, demand for stock far exceeded the supply offered, resulting in significantly higher aftermarket prices. SEC and other governing body rules require underwriters to make a complete distribution of IPO shares at the IPO price. Underwriters are prohibited from deriving financial gain from increases in aftermarket prices of hot IPO stocks. They cannot allocate shares to themselves, and shares allocated after trading commences at a higher price must be distributed at the IPO price.

Underwriters distributed IPO shares to the market and controlled who received hot IPO allocations. In doing so, they distributed what were essentially instant, risk-free profits. For example, an investor receiving an IPO allocation of Issuer SourceForge, Inc. stock (formerly VA Linux) at its IPO price of $30 per share on the morning of December 9, 1999, realized a ten-fold profit when VA Linux shares opened for public trading later that morning at $299 per share.

Underwriters, together with Issuer insiders, shared in these profits. Underwriters demanded kickbacks of profits from customers who received allocations of hot IPOs and "flipped" (immediately sold) the shares at significantly higher aftermarket prices. Underwriters disguised their profit-sharing arrangements because they were illegal. In a complaint filed against Underwriter Credit Suisse First Boston ("CSFB"), the SEC explained:

> In exchange for shares in "hot" IPOs, CSFB wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock. From at least April 1999 through June 2000, CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 65 percent of their profits to CSFB. The profits were channeled to CSFB in the form of excess brokerage commissions generated by the customers in unrelated securities trades that the customers generally affected solely to satisfy CSFB's demands for a share of the IPO profits.

To increase the profit potential of hot IPOs, Underwriters and Issuer insiders engaged in what the SEC refers to as "laddering." They agreed to underprice hot IPO shares—to the detriment of the

IPO issuer—and required recipients of IPO allocations to "ratchet up" the stock price in the aftermarket by buying additional shares at progressively higher prices.[1] This conduct is prohibited.

Issuer insiders also personally benefited from underpricing and laddering schemes. Issuer insiders allocated underpriced IPO shares to themselves, friends, and family members. Like Underwriters, laddering allowed insiders to profit from sales at inflated prices.

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[1] Academics refer to underpricing as "money left on the table"—money issuers could have raised in an IPO. Tim Loughran & Jay Ritter, *Why Has IPO Underpricing Changed Over Time?*, 33 FIN. MGMT. 5, 6 (Autumn 2004). The targeted insiders in this appeal profited substantially from the conducted alleged. The 54 IPOs at issue generated over $7 billion in proceeds for Issuers, but left over $15 billion "on the table." This makes them among the most egregious examples of IPO underpricing. *See generally* Jay Ritter, *Money Left on the Table in IPOs by Firm* (Mar. 19, 2008), *available at* http://bear.warrington.ufl.edu/ritter/moneyonthetablebyfirm.pdf. The phenomenon of intentionally underpricing IPOs has generated a tremendous amount of recent scholarship, essentially all of which supports the thesis underlying Respondent's Section 16(b) claim. *See generally* Xiaoding Lui & Jay R. Ritter, *Corporate Executive Bribery: An Empirical Analysis* (Dec. 4, 2007), *available at* http://bear.warrington.ufl.edu/ritter/work_papers/BriberyDec42007.pdf; J. Griffin et al., *Why are IPO Investors Net Buyers Through Lead Underwriters?*, 85 J. FIN. ECON. 518 (2007); Stephen J. Choi & A.C. Pritchard, *Should Issuers be on the Hook for Laddering? An Empirical Analysis of the IPO Market Manipulation Litigation*, 73 U. CIN. LAW REV. 179 (2004); Tim Loughran & Jay Ritter, *Why Don't Issuers Get Upset About Leaving Money on the Table in IPOs?*, 15 REV. FIN. STUD. 413 (2002). These articles cite, and are cited by, many others supporting the same or related propositions.

Underwriters and Issuer insiders worked together to underprice IPOs and drive up aftermarket stock prices as part of a common objective that involved acquiring, holding, and disposing of Issuer shares. They thereby formed groups that collectively owned more than 10 percent of an issuer's stock, establishing the Underwriters' status as statutory insiders under Section 16(b). As statutory insiders, Underwriters profited from short-swing transactions in Issuer shares. Pursuant to Section 16(b), these insiders must disgorge the profits generated from the short-swing purchases and sales of Issuer shares in which they had a direct or indirect pecuniary interest.

B. Insiders' Failure to Disclose Section 16(a) Information

Underwriters do not, and cannot, point to any evidence that they have ever disclosed Section 16(a) information. Underwriters have never filed Section 16(a) reports. They assert each IPO at issue here was fully "challenged" in the *IPO* litigation. Pet. at 8. However, no other litigation, including the *IPO* litigation, has addressed or released Respondent's Section 16(b) claims. Underwriters also do not, and cannot, point to any evidence that the *IPO* or other litigation revealed the targeted insiders' short-swing profits and other information required to be disclosed in Section 16(a) reports.

Respondent—through an extensive investigation on the part of her attorneys—nevertheless "piece[d] together" the framework of a Section 16(b) claim "from disparate sources of information."[2] *Litzler*, 362 F.3d at 208. One source of information included academic and financial research and literature published in just the last few years. *See supra* note 1. These articles posited, albeit only generally, what Respondent determined was coordinated conduct among Underwriters and Issuer insiders to obtain huge, risk-free profits by disguising their beneficial ownership in Issuer securities traded on the short-swing. *See id*. Their uniform conduct gives rise to the Section 16(b) violations on which these cases are based. The targeted insiders' actual short-swing trading details, however, remain publicly unknown ***to this day***. This is for one reason only: the insiders have continued to conceal this core Section 16(a) information.

Financial economists have continued their quest to understand the IPO underpricing phenomenon long after Respondent researched, investigated, and filed her Section 16(b) claims. In the May 2010 edition of Oxford University's *The Review of Financial Studies*, Professors Xiaoding Liu and Jay R. Ritter note that their analysis of underwriters' allocation of underpriced "hot" IPO shares to issuer insiders between 1996 and 2000, which were later "spun" for quick profit, has been a long and painstaking process "***mainly due to the lack of data***." Xiaoding Lui &

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[2] This stands in stark contrast to how Congress designed Section 16 to operate. "Section 16 compels disclosure through a [Section 16(a) report] that is so clear that an insider's short-swing profits will be discovered without ***any*** investigation other than the putting together of two and two. The prophylaxis of Section 16 works by imposing an absolute duty of disclosure upon insiders, officers, and the other parties covered by its obligations." *Litzler*, 362 F.3d at 208 (citation omitted) (emphasis added).

Jay R. Ritter, *The Economic Consequences of IPO Spinning*, 23 REV. FIN. STUD. 2024, 2025 (2010) (emphasis added). Professors Liu and Ritter had previously presented their conclusions in September 2009 at the Harvard Law School Forum on Corporate Governance and Financial Regulation. Their conclusions fully support the analytical framework of the Section 16(b) complaints Respondent filed two years earlier.

C. Respondent's Complaint and District Court Consolidation

Respondent issued demands to each Issuer as required by Section 16(b). None of the statutory insiders, however, had filed Section 16(a) reports—the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Whittaker,* 639 F.2d at 528. Respondent, therefore, had no access to the short-swing trading and group membership details.

Respondent commenced litigation when no Issuer filed suit within 60 days after her demand. She filed 55 lawsuits in the United States District Court for the Western District of Washington (Seattle) in October 2007. All 55 suits alleged Section 16(b) violations stemming from the uniform business practices adopted and repeatedly employed by the 11 Underwriter defendants as described above.[3] The district court's subject matter jurisdiction was based on Section 27 of

[3] There were hundreds of IPOs in which the Underwriters engaged in the same misconduct. The 55 cases Respondent filed represent the clearest and most egregious examples.

the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. The district court reassigned all the actions to a single judge and coordinated the cases for pretrial purposes.

III. DECISION OF THE DISTRICT COURT

Underwriters filed an omnibus Federal Rule of Civil Procedure 12 motion to dismiss. They asserted that Respondent's claims were time barred by operation of Section 16(b)'s two-year statute of limitations. Although the beneficiaries of any recovery, 30 of the then 54 issuers ("Moving Issuers")[4] also filed a joint motion to dismiss. Like Underwriters, Moving Issuers asserted that Respondent's claims were time barred. They also asserted, however, that Respondent served factually inadequate pre-suit demands. On March 12, 2009, the district court granted the motions on both statute of limitations and pre-suit demand grounds, and entered judgment against Respondent.

IV. DECISION OF THE NINTH CIRCUIT

Respondent appealed the district court decision to the Ninth Circuit Court of Appeals, invoking the court's appellate jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit reversed the statute of limitations dismissal. Following its long-standing *Whittaker* precedent, the Ninth Circuit held that the two-year statute of limitations in Section 16(b) does not begin to

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[4] Respondent voluntarily dismissed one of the 55 cases after the issuer involved was taken private and, as a result, Respondent lost standing to maintain the Section 16(b) action. *See Gollust*, 501 U.S. at 125-26 (explaining Section 16(b) standing requirements).

run until the insider discloses its transactions in a Section 16(a) report.[5]

Despite the insiders' noncompliance with Section 16(a)'s reporting obligations, the Ninth Circuit affirmed the district court's ruling that Respondent's demand was insufficient and that Respondent could not argue demand futility. The Ninth Circuit also, *sua sponte*, "converted" those dismissals "without prejudice" to dismissals "with prejudice"—and did not permit leave to amend on remand. The propriety of the Ninth Circuit's decision on pre-suit demand issues is the subject of Respondent's separately-filed Petition for Writ of Certiorari that this Court placed on the docket April 7, 2011, as No. 10-1218.

REASONS FOR DENYING THE PETITION

The Ninth Circuit decision does not represent the first time a federal court has addressed whether the failure to report under Section 16(a) tolls the two-year limitations period in Section 16(b). Numerous federal courts throughout the country have considered the issue. *See, e.g.*, *Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 207 (2d Cir. 2004); *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981); *Capitol First Corp. v. Todd*, No. 04-6439 (MLC), 2006 WL 3827329 (D.N.J. Dec. 27, 2006); *Dreiling v. Am. Online, Inc.*, No. C05-1339JLR, 2005 WL 3299828 (W.D. Wash. Dec. 5, 2005); *Segen v. Comvest Venture Partners, LP*, No.

[5] Moving Issuers, like Underwriters, argued for dismissal on statute of limitations grounds at the Ninth Circuit. However, Moving Issuers, unlike Underwriters, have not petitioned this Court for a writ of certiorari on this issue. Nor have Moving Issuers joined in Underwriters' petition. *See* S. Ct. R. 12(4).

Civ.A. 04-822 JJF, 2005 WL 1320875 (D. Del. June 2, 2005); *Tyco Int'l Ltd. v. Kozlowski*, No. MDL 02-1335-B, Civ. 03-CV-1339-PB, 2005 WL 927014 (D.N.H. Apr. 21, 2005); *Dreiling v. Am. Express Travel Related Servs. Co., Inc.*, 351 F. Supp. 2d 1077 (W.D. Wash. 2004); *Rosen ex rel. Egghead.com, Inc. v. Brookhaven Capital Mgmt., Co., Ltd.*, 179 F. Supp. 2d 330 (S.D.N.Y. 2002); *Morales v. Executive Telecard, Ltd.*, No. 95 Civ. 10202(KMW), 1998 WL 314734 (S.D.N.Y. June 12, 1998); *Shattuck Denn Mining Corp. v. La Morte*, No. 67 Civ. 3222, 1974 WL 373 (S.D.N.Y. Mar. 8, 1974); *Blau v. Albert*, 157 F. Supp. 816 (S.D.N.Y. 1957); *Carr-Consol. Biscuit Co. v. Moore*, 125 F. Supp. 423 (M.D. Pa. 1954); *Grossman v. Young*, 72 F. Supp. 375 (S.D.N.Y. 1947); *Dreiling v. Kellett*, No. C01-1528P (Dkt. 114) (W.D. Wash. Feb. 14, 2003) (denying defendants' summary judgment motion).

With only one exception,[6] each of these courts reached the same conclusion as the Ninth Circuit did: the statute of limitations for Section 16(b) claims does not begin to run if Section 16(a) information has not been disclosed. As discussed below, the Ninth and Second circuits are not split on the issue, and the substantially uniform holdings of all the above federal

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[6] The one exception is the *Carr-Consolidated Biscuit* district court case from 1954. However, as noted by the Ninth Circuit 27 years later, the court in *Carr-Consolidated Biscuit* relied on a theory about statutes of limitations that was subsequently "discarded" and "renounced" by courts including this Court. *Whittaker*, 639 F.2d at 529 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556-59 (1974)). Other courts have similarly declined to follow *Carr-Consolidated Biscuit* on the issue. *See, e.g.*, *Capitol First Corp.*, 2006 WL 3827329 at *11.

cases are not in conflict with any decision from this Court.

I. THERE IS NO RELEVANT SPLIT OF AUTHORITY BETWEEN THE SECOND AND NINTH CIRCUITS.

A. Both *Litzler* and *Whittaker* Toll Section 16(b)'s Statute of Limitations When the Insider Has Failed to Report Under Section 16(a).

The Second Circuit in *Litzler* and the Ninth Circuit in *Whittaker* are not divided in any way material to this litigation. Both cases hold that the two-year limitations period in Section 16(b) is tolled when the targeted insider has failed to file the required Section 16(a) report. *Compare Litzler*, 362 F.3d at 207-08 ("We now hold that tolling of the limitations period in Section 16(b) . . . is appropriate when a defendant has failed to comply with the reporting requirements of Section 16(a). . . . We hold that the incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a) . . . ."), *with Whittaker*, 639 F.3d at 530 ("[W]e hold that 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."). *See also* Peter Romeo & Alan Dye, SECTION 16 § 9.03[3][b] at 872 n.107 (3d ed. 2008) (citing *Litzler*, *Whittaker*, and many other cases for same proposition).

Both courts also apply similar rationales to support their holdings. Both read Sections 16(a) and 16(b) as a whole, and agree that Congress' purpose in enacting Section 16 would be frustrated if targeted insiders could escape Section 16(b) liability by failing to comply with their Section 16(a) reporting obligations. The Second Circuit in *Litzler* reasoned:

- "[T]o allow an offending investor to escape responsibility under Section 16(b) by violating the provisions of Section 16(a) would manifestly frustrate the purpose of Congress." *Litzler*, 362 F.3d at 207 (citation and quotation omitted).

- "Section 16 compels disclosure (through a Form 4 [Section 16(a) report]) that is so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two." *Litzler*, 362 F.3d at 208.

- "The prophylaxis of Section 16 works by imposing an absolute duty of disclosure upon insiders." *Id.*

- "We hold that the incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a)." *Id.*

The Ninth Circuit in *Whittaker* similarly reasoned:

- A rule allowing insiders to "escape liability by not reporting as required under Section 16(a)" would "thwart[]" Congress' purpose in enacting Section 16 to "curb insider trading." *Id.* at 528.

- The "short [two-year] limitations period [for Section 16(b) claims] is understandable only in the context of the insider's duty to make prompt disclosure" in Section 16(a) reports. *Id.*

- Section 16(a) reports are the "main source of information for the suits Congress has empowered [shareholders] to bring." Insiders could "insulate their transactions . . . by failing to file §16(a) reports and waiting for the two year time limit to pass" thereby "nullif[ying]" "Congress' creation of these shareholder' derivative suits." *Id.*

- Section 16 imposes "absolute accountability within clearly demarcated boundaries," and the "goal of clear boundaries is served by a limitations period which can be mechanically calculated from objective facts." *Id.* at 529.

Petitioners argue that *Litzler* implies that a reasonable failure to file Section 16(a) reports warrants avoiding tolling. Pet. at 16 (citing *Litzler*, 362 F.3d at 208 n.5). This position, however, was not the holding of the Second Circuit. It was not even dictum of the court. It was a side-comment addressing what the "author of th[e] opinion" (Judge Jacobs) "would have preferred to say." *Litzler*, 362 F.3d at 208 n.5. Even then, Judge Jacobs based his passing editorial on concern that "long-settled transactions might hang forever over ***honest*** persons." *Id.* (emphasis added). Petitioners' conduct was anything but "honest." Petitioners engaged in SEC-prohibited, bad-faith kickback schemes that unlawfully concealed their beneficial ownership in issuer securities by conducting short-swing trades through customer accounts.

B. The Failure to Disclose Section 16(a) Information Does Not End Tolling Under Either *Litzler* or *Whittaker*.

The only difference between the Second Circuit opinion in *Litzler* and the Ninth Circuit opinion in *Whittaker* is how tolling ends. That difference, however, is not material to this litigation. In the Ninth Circuit, tolling ends when the insider files a Section 16(a) report. *Whittaker*, 639 F.2d at 530 ("The two-year period for § 16(b) begins to run when the transactions are disclosed in the insider's § 16(a) report."). At that point, a claimant has two years to bring suit even if the insider is alleged to have "falsely reported" or filed an "improper disclosure" under Section 16(a). *Roth v. Reyes*, 567 F.3d 1077, 1081, 1083-84 (9th Cir. 2009).[7]

[7] For this reason, Petitioners' fear that the Ninth Circuit decision creates a risk of "indefinite" tolling is unfounded. Pet. at 1. All any insider needs to do to stop tolling is comply with the statutory obligation and file a Section 16(a) report. The report can be filed at any time and does not constitute an admission of liability. The report also may be filed, without prejudice, reserving all rights the insiders would claim in this case. For example, filing a Section 16(a) report is not an admission of membership in a Section 13(d) group. Nor does it concede beneficial ownership. *See* 17 C.F.R. § 240.16a-1(a)(4); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 129 (2d Cir. 2001). As the Ninth Circuit held in *Roth*, even an insider's alleged "false" claim of exemption in a Section 16(a) report does not change the fact that filing the report ends tolling. *Roth*, 567 F.3d at 1081, 1083-84.

In the Second Circuit, tolling ends either when the insider files a Section 16(a) report or when the "claimant or (depending on the circumstances) the company gets ***actual*** notice that a person subject to Section 16(a) ***has realized specific short-swing profits*** that are worth pursuing." *Litzler*, 362 F.3d at 208 (emphasis added). The Second Circuit underscored that "actual notice" in this context means the plaintiff received "notice tantamount to a Form 4 [Section 16(a) report]." *Id.* The *Litzler* court provided three examples that would ***not*** suffice as "tantamount" to a Section 16(a) filing: "mere inquiry notice"; "circumstances in which a person would or should have realized the non-compliance"; and "the ability of a shareholder or company to piece together the substance of a Form 4 [Section 16(a) report] from disparate sources of information." *Id.* The court also summarized two district court cases holding other SEC filings (Forms 144, 10-Q, and 13D) likewise would not provide equivalent Section 16(a) disclosure. *Id.* at 208 n.6. In sum, the Second Circuit decision in *Litzler* holds that the Section 16(b) two-year time period begins to run when the plaintiff gets actual notice of Section 16(a) information, including the "specific short-swing profits" trading details.[8]

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[8] Respondent and leading Section 16 commentators believe the Ninth Circuit *Whittaker* decision provides the better approach as to when tolling ends. Romeo & Dye, *supra*, § 9.03[3][b] at 873. *Whittaker* is more consistent with insiders' obligation to report short-swing trading to the SEC. *Id.* *Whittaker* also provides a clear rule for district courts to carry out before expensive and time-intensive litigation on the merits. The Second Circuit approach could require uncertain, lengthy, and costly fact-intensive pretrial litigation and trials just to resolve a statute of limitations "actual notice" defense.

Underwriters have no evidence that Respondent has (or ever had) actual notice of the Section 16(b) insiders' "***specific short-swing profits***." *Litzler*, 362 F.3d at 208 (emphasis added). Petitioners state the *IPO* litigation revealed "the facts underlying the Section 16(b) claims." Pet. at 18.[9] The implication of this argument is that the *IPO* litigation revealed the insiders' "specific short-swing profits" or other Section 16(a) information sufficient to end tolling under *Litzler*. This is not true. Underwriters cite no evidence in the district court or Ninth Circuit record that reveals ***any*** Section 16(a) information, much less "specific short-swing profits" or a notice "tantamount to" a Section 16(a) report. Nor is there any.[10]

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[9] Underwriters repeatedly refer to notice of the "underlying facts." *See, e.g.,* Pet. at 2, 18. Underwriters, however, never describe the "facts" ostensibly revealed or identify the "notice" allegedly containing those "facts." This is not the proper test under *Litzler* in any event, as discussed above. Actual notice, under *Litzler*, refers to actual notice of a Section 16(a) report equivalent, disclosing the specifics of the short-swing trading details. Underwriters and Issuer insiders have never disclosed ***these*** "underlying facts."

[10] Consideration of such evidence would be inappropriate on a Rule 12 motion to dismiss in any event, as the Second Circuit in *Litzler* recognized. The Second Circuit remanded the case for further proceedings, including potentially "trial." *Litzler*, 362 F.3d at 208. The alleged "actual notice" was based on a letter from a shareholder to the corporate board. *Id.* at 205. The parties agreed that whatever notice this letter provided would be imputed to the bankruptcy trustee who had substituted in as the plaintiff. *Id.* at 205-06. The court indicated the district court would have to evaluate any "particulars recited" in the notice and the reliability of the "source" from which it came in order to assess whether the shareholder letter was truly "tantamount to" an insider's Section 16(a) report. *Id.* at 208.

Underwriters also lack evidence that Respondent herself (or her attorneys) received ***any*** notice from the *IPO* litigation. Respondent was not a shareholder when the *IPO* litigation complaints were filed. She was not a member of the proposed class covered by the *IPO* litigation. Petitioners offer nothing even remotely akin to the type of evidence that would constitute actual notice of Section 16(a) information as described in *Litzler*.

In sum, the fundamental holding of both the Second Circuit in *Litzler* and the Ninth Circuit in *Whittaker* is to toll the two-year statute of limitations for Section 16(b) claims when the targeted insiders have failed to comply with their Section 16(a) reporting obligations. These Circuits diverge only on a narrow point—whether tolling ends only when the insider files a Section 16(a) report (*Whittaker*), or whether tolling ends either when the Section 16(a) report is filed or when the plaintiff has otherwise received actual notice of all Section 16(a) information (*Litzler*). It is difficult to envision any case where the difference between these two tests would actually matter. Regardless, the difference has no bearing here. Section 16(a) reports have not been filed, nor has Section 16(a) information been disclosed in any other manner.

II. TOLLING WHEN INSIDERS FAIL TO DISCLOSE THEIR SHORT-SWING TRADING ACTIVITIES DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

Review of the Ninth Circuit's statute of limitations decision also is not warranted on the ground that the decision conflicts with this Court's opinions in *Lampf,* *Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010). There is no conflict. Neither *Lampf* nor *Merck* is a Section 16 case. Neither case holds that Section 16(b)'s two-year statute of limitations can or should operate as a statute of repose when the targeted insiders, as here, have failed to comply with Section 16(a)'s reporting obligations. *Lampf*'s discussion of Section 16(b) is dictum, limited to a single footnote to explain why Section 16(b) is unique and therefore of no value to the Court's analysis. *Lampf*, 501 U.S. at 360 n.5. *Merck* does not even mention Section 16(b).

In *Lampf*, this Court rejected application of equitable tolling to the time limit for claims arising under Section 10(b) of the Securities Exchange Act of 1934. Section 10(b) did not contain a limitations period, unlike other provisions in the Act. The Court therefore looked to other causes of action in the Act that included some variation of a one-year discovery period coupled with a three-year period of repose. Section 16, as the Court noted, was different. Although the Court called Section 16(b)'s two-year limitations period a "statute of repose,"[11] the Court did "not find § 16(b) to be an appropriate source from

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[11] This discussion was dictum as noted above. The Court did not analyze whether the "statute of repose" label was proper or, more importantly, whether it was intended to be used in the way Underwriters argue. In one sense, the label fits: once a Section 16(a) report is filed, the two-year period in Section 16(b) serves as an outside limit that cuts off untimely claims—even if the Section 16(a) filing contains false or improper disclosures. *See, e.g.*, *Roth*, 567 F.3d at 1081, 1083-84. As the Ninth Circuit has held, however, this still is consistent with *Whittaker*. *Id.*

which to borrow a limitations period" because Section 16(b) "differs in focus from § 10(b) and from the other express causes of action." *Lampf*, 501 U.S. at 360 n.5.

Underwriters (and Judge Smith's concurring opinion below) mischaracterize Section 16 as a "companion" provision with similar "relevant language" to the other statutes of limitations in the Act. Pet. 19, 21. This Court correctly viewed Section 16 as unique. The other causes of action in the Act contain limitations language that materially differs from Section 16(b). *See, e.g.*, *Merck*, 130 S. Ct. at 1790 (quoting 28 U.S.C. § 1658(b); *id.* at 1795 (discussing 15 U.S.C. §§ 78i(e), § 77m); *Lampf*, 501 U.S. at 360 (quoting 15 U.S.C. §§ 78i(e), § 78r(c), § 77m). Most significantly, the other limitations provisions include express discovery rules where the focus is on the ***plaintiff*** (whether the plaintiff, or a reasonably diligent plaintiff, discovered certain facts supporting the cause of action). *Id.*; *see also Merck*, 130 S. Ct. at 1793-98 (describing how discovery rule operates); *Lampf*, 501 U.S. at 358-64 (same). Section 16 contains its own, differently worded, two-year time limit, no discovery rule, and, instead, a unique disclosure obligation where the focus is on the ***defendant*** (whether the targeted insider disclosed its short-swing transactions in a required Section 16(a) report).

Lampf held that tolling was "unnecessary" for Section 10(b) claims in light of the discovery rule. *Lampf*, 501 U.S. at 363. Section 16(b) has no similar discovery rule that would render tolling "unnecessary." For this reason, district courts and commentators have concluded that *Lampf* does not prevent tolling of the Section 16(b) statute of limitations when the insider has failed to comply with its Section 16(a) disclosure obligation. *See, e.g.*, *Tristar Corp. v. Freitas*, 867 F. Supp. 149, 154 n.4 (E.D.N.Y. 1994) ("*Lampf* does not preclude the Court from concluding that tolling is still available under section 16(b)."), *rev'd on other grounds*, 84 F.3d 550 (2d Cir. 1996); *Kellett*, No. C01-1528P, slip op. at 9 (further noting that no court has ever read *Lampf* to eliminate Section 16(b) tolling, including cases that adopted *Whittaker* after *Lampf* was decided); Marc I. Steinberg & Daryl L. Landsdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 NOTRE DAME L. REV. 33, 59-60 (1992).

Underwriters argue Congress could have been more explicit in tying Section 16(b)'s limitations period to the filing of Section 16(a) reports. Pet. at 21. However, the two subsections are part of the same statute, and the statute of limitations in Section 16(b) is grammatically linked to the disclosure obligation in Section 16(a). The limitations provision appears in the second sentence of Section 16(b) and reads: "no such suit shall be brought more than two years after the date ***such*** profit was realized." (Emphasis added). "Such" profit means "any profit realized by" "***such*** beneficial owner, director, or officer" (the first sentence of Section 16(b)), and "such" beneficial owner, director, or officer is defined in Section 16(a)(1) in setting out the scope of the disclosure obligation—i.e., which persons are required to filed Section 16(a) reports. In short, contrary to Underwriters' interpretation, Sections 16(a) and (b) ***must*** be read together. *See also Foremost-McKesson*, 423 U.S. at 234 n.1 (noting Section 16(a) defines the insiders whose trading is regulated by Section 16(b)). Yet Underwriters' interpretation of the Section 16(b) time limit would require the Court to sever Section 16(a)'s disclosure obligation from the statute.

Section 16 must be read as a whole to effectuate its purpose. *Reliance Elec.*, 404 U.S. at 424 (Section 16(b) must be construed in manner "that best serves the congressional purpose of curbing short-swing speculation by corporate insiders"); *see also Whittaker*, 639 F.2d at 528 ("The disclosures and reports of § 16(a) are an integral part of the context of § 16 within which § 16(b) must be read."). The short, two-year limitations period makes sense only in the context of the insider's obligation to make prompt disclosures under Section 16(a). *Whittaker*, 639 F.2d at 528; *see also* Steinberg & Landsdale, *supra*, 68 NOTRE DAME L. REV. at 59 (Section 16(b) "logically affords a remedy that presumes that the subject insider timely filed the reports mandated" by Section 16(a)). The congressional intent, as described by the Court in *Reliance Electric*, "would be thwarted if insiders could escape liability by not reporting" as Section 16(a) requires. *Whittaker*, 639 F.2d at 528. Underwriters' interpretation would provide insiders with a massive financial incentive ***not*** to file Section 16(a) reports:

> "It would be a simple matter for the unscrupulous to avoid the salutary effect of Section 16(b) which provides a remedy for the recovery of short term profits, simply by failing to file [Section 16(a) reports] and thereby concealing from prospective plaintiffs the information they would need to adequately protect their interests. Such a construction

> would reward the violation of the statute and would manifestly frustrate congressional intent."

Id. (quoting *Blau*, 157 F. Supp. at 819) (citing *Grossman*, 72 F. Supp. at 378-79).

> "Only by full compliance with Section 16(a) can the security holders be charged with adequate notice of the transaction." Such shareholders are likely to be outsiders, minority holders. Their main source of information for the suits Congress has empowered them to bring likely will be the required § 16(a) reports. If insiders could insulate their transactions from the scrutiny of outside shareholders by failing to file § 16(a) reports and waiting for the two year time limit to pass, then Congress' creation of these shareholders' derivative suits would be nullified.

Id. (quoting Donald C. Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 414 (1953)) (footnote omitted); *see also Litzler*, 362 F.3d at 207 (same); Steinberg & Landsdale, *supra*, 68 NOTRE DAME L. REV. at 59 (same).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Underwriters' petition.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

Blank Section 16(a) Report Form

[See foldout, next 2 pages]

FORM 4

☐ **Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).**

(Print or Type Responses)

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

OMB APPROVAL	
OMB Number:	3235-0287
Expires:	November 30, 2011
Estimated average burden hours per response.	0.5

1. Name and Address of Reporting Person* (Last) (First) (Middle) (Street) (City) (State) (Zip)	2. Issuer Name and Ticker or Trading Symbol 3. Date of Earliest Transcaction Required to be Reported (Month/Day/Year) 4. If Amendment, Date Original Filed(Month/Day/Year)	5. Relationship of Reporting Person(s) to Issuer (Check all applicable) ______Director ______10% Owner ______Officer (give title below) ______Other (specify below) ________________ 6. Individual or Joint/Group Filing (Check Applicable Line) __Form filed by One Reporting Person __Form filed by More than One Reporting Person

Table I — Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1. Title of Security (Instr. 3)	2. Trans-action Date (Month/Day/Year)	2A. Deemed Execution Date, if any (Month/Day/Year)	3. Trans-action Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned Following Reported Transaction (s) (Instr. 3 and 4)	6. Owner-ship Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Owner-ship (Instr. 4)
			Code	V	Amount	(A) or (D)	Price			

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

* If the form is filed by more than one reporting person, *see* Instruction 4(b)(v).

Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

(Over)
SEC 1474 (01-05)

FORM 4 (continued)

Table II — Derivative Securities Acquired, Disposed of, or Beneficially Owned
(*e.g.*, puts, calls, warrants, options, convertible securities)

1. Title of Derivative Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (Month/Day/Year)	3A. Deemed Execution Date, if any (Month/Day/Year)	4. Transaction Code (Instr. 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)		6. Date Exercisable and Expiration Date (Month/Day/Year)		7. Title and Amount of Underlying Securities (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of derivative Securities Beneficially Owned following Reported Transaction(s) (Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
				Code	V	(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares				

Explanation of Responses:

** Intentional misstatements or omissions of facts constitute Federal Criminal Violations.
See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).

**Signature of Reporting Person

Date

Note: File three copies of this Form, one of which must be manually signed. If space is insufficient, *see* Instruction 6 for procedure.

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