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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the two-year time limit for bringing a lawsuit under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is tolled when the defendant has failed to comply with the disclosure requirements of Section 16(a), 15 U.S.C. § 78p(a).

LIST OF PARTIES

Pursuant to Rules 24.1(b) and 24.2, below is a list of all parties to the proceedings in the court whose judgment is under review:

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 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.
31. Foundry Networks, Inc.
32. Avanex Corporation
33. Turnstone Systems, Inc.
34. Silicon Image, Inc.
35. Juniper Networks
36. Kana Software, Inc.
37. Interwoven, Inc.
38. Openwave Systems, Inc.
39. Informatica Corporation
40. Critical Path, Inc.
41. SourceForge, Inc.
42. Concur Technologies, Inc.
43. Palm, Inc.
44. Brocade Communications Systems, Inc.
45. Microtune, Inc.
46. Extreme Networks, Inc.
47. InsWeb Corporation
48. Marvell Technology Group Ltd.

49. Keynote Systems, Inc.
50. Tibco Software Inc.
51. Transmeta Corporation
52. Airspan Networks, Inc.
53. OmniVision Technologies, Inc.
54. Immersion Corporation

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STATUTORY PROVISION INVOLVED

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

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*** . . . 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.

* * *

(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 . . . or a security-based swap agreement . . . involving any such equity security 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).

Congress enacted Section 16(b) of the Securities Exchange Act of 1934 ("1934 Act") "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, 507-08 (2d Cir. 2007) (summarizing statutory and regulatory basis for group status). With group status, each member is a statutory insider individually subject to both Sections 16(a) and (b). *Id.* (citing 17 C.F.R. § 240.13d-5(b)(1)). Group status becomes an element of a Section 16(b) case where, as here, "group" is necessary for a member, such as an underwriter, to be deemed a Section 16 statutory insider.

The underlying right afforded by Section 16(b) is an issuer's entitlement to insiders' short-swing profits. Insiders are "presumed to have access to inside information." *Foremost-McKesson*, 423 U.S. at 243. They must disgorge their profits to the issuer when they profit from trades in publicly-traded issuer shares within any six-month period ("short-swing trading"). 15 U.S.C. § 78p(b); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

Congress did not give the 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 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); *see also Pellegrino v. Nesbit*, 203 F.2d 463, 466 (9th Cir. 1953) (Section 16(b) plaintiff "is merely an instrument for effectuating the statutory policy"); Peter Romeo & Alan Dye, *Section 16* § 9.02[3] (2008) ("plaintiff's attorneys are the protagonists" in most Section 16(b) cases; "their activities are critical to the success of the provision.").

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 securities transactions. 15 U.S.C. § 78p(a). That disclosure enables Section 16(b) enforcement. 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 [Section 16(a)] and to provide for the recovery of any short swing profits [Section 16(b)].

Interpretive Release on Rules Applicable to Insider Reporting and Trading, Release No. 34-18114, 46 Fed. Reg. 48147-01, at 48147 (Oct. 1, 1981) [hereinafter "SEC Interpretative Release"] (footnotes omitted); *see also infra* at 20-21, 24-26 (detailing relationship between Section 16(a) disclosure and Section 16(b) liability).

The "reports" to which the SEC refers are commonly known as "Section 16(a) reports." They "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 reports provide the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Id.*; *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." (quoting *Grossman v. Young*, 72 F. Supp. 375, 378 (S.D.N.Y. 1947))).

Section 16(a) requires statutory insiders to disclose:

- The reporting person's identity.
- 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 transactions.
- The amounts, prices, and nature of the securities bought or sold.

15 U.S.C. § 78p(a); Resp. App. 1b (blank Section 16(a) report). Section 16(a) reports allow the examining shareholder to determine whether any purchases and sales, or sales and purchases, have occurred within periods of less than six months, and, if so, 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, shareholders have no access to the short-swing profit and other claim-related information they need to enforce Section 16(b) as Congress envisioned.

II. STATEMENT OF FACTS

A. Plaintiff's Claim

From 1998 through 2000, the stock market experienced a surge of "hot" initial public offerings

("IPOs"). Shares in these IPOs immediately traded at a premium in the aftermarket. Petitioners ("Underwriters") served as lead underwriters for most "hot" IPOs during the dot-com era, including those of the nominal-party issuers ("Issuers"), and reaped extraordinary profits—risk-free—through short-swing trades in Issuer IPO shares. JA 57-62. SEC-approved governing body rules require underwriters to make a complete distribution of IPO shares at the IPO price. 15 U.S.C. § 78s(b); National Association of Securities Dealers, Inc. ("NASD") Conduct Rules 2110, 2330(f), *available at* http://www.sec.gov/pdf/nasd1/2000ser.pdf. Underwriters are prohibited from deriving financial gain from increases in aftermarket prices of hot IPO shares. *Id.* They cannot allocate shares to themselves, and shares allocated after trading commences at a higher price still must be distributed at the IPO price. *Id.*; *see also* JA 58-60.

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. shares (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. Excerpts of Record (9th Cir.) 179, 182.

Underwriters devised a scheme to share in these profits. JA 57-62. They allocated shares in hot IPOs to select customers who agreed to immediately sell the shares at significantly higher aftermarket prices and kick back a large percentage of the profits to Underwriters. *Id.* Underwriters disguised their profit-sharing arrangements—by putting shares in customer accounts rather than their own—because such arrangements are prohibited. JA 58; NASD Conduct Rule 2330(f). In a complaint filed against Petitioner 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.

JA 141-142.

Underwriters also engaged in "laddering" to increase the profit potential of hot IPOs. JA 58. They required IPO allocation recipients to "ratchet up" the aftermarket stock price by buying additional shares at progressively higher prices. *Id.* This conduct also is prohibited. 17 C.F.R. § 242.101(a). It manipulated the market by giving Underwriters the ultimate informational advantage of knowing the price at which issuer shares would later trade.

Underpricing was a key component of Underwriters' risk-free profit scheme. Academics refer to underpricing as "money left on the table"—money issuers could have raised in an IPO. JA 67. 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 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.

Over the course of several years, evidence of a counter-intuitive fact began to emerge as more details of the underpricing phenomenon unique to the dot-com period were uncovered. IPO underpricing was a scheme not limited to Underwriters. It was a coordinated group effort that included key Issuer decision-makers. Top-level executive insiders of Issuers were involved in, and profited from, underpricing. They put their own financial interests ahead of those of the companies to which they owed fiduciary duties of loyalty and deliberately underpriced their companies' IPOs to facilitate and participate in Underwriters' risk-free profit scheme.[1] *Cf.* Donald

[1] Issuer decision-makers' profit motives were substantial. For example, CEO Jerry Rawls described Finisar's IPO as "really successful" despite leaving hundreds of millions of dollars on the table. JA 172. The Merrill Lynch-led IPO was priced at $19 per share. JA 175. On the first day of trading, those shares traded as high as $108. JA 184. Fewer than 30 days later, with Finisar shares trading over $100, Merrill Lynch issued an analyst report stating the shares were ***undervalued***. JA 185-188. Five months after the IPO, Finisar issued a secondary offering in which Merrill Lynch released the lock-ups and allowed Rawls, his family, and affiliates to sell $188 million of their shares at $100 per share. JA 189-195. Finisar insiders collectively sold $570 million of stock. *Id.* What was not known then, although known now, is that these

Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 407 (1953) (Section 16(b) "is designed to remove all temptation to faithlessness."). The phenomenon of intentionally underpricing IPOs has generated a tremendous amount of recent scholarship, essentially all of which supports the thesis underlying Plaintiff's Section 16(b) claim. *See generally* J. Griffin et al., *Why are IPO Investors Net Buyers Through Lead Underwriters?*, 85 J. Fin. Econ. 518 (2007); Xiaoding Lui & Jay Ritter, *Corporate Executive Bribery: An Empirical Analysis* (Dec. 4, 2007), *available at* http://bear.warrington.ufl.edu/ritter/work_papers/BriberyDec42007.pdf.

Plaintiff's Section 16(b) cases address this only-recently-understood iteration of the intentional underpricing phenomenon. JA 59-62 (group conduct allegations). The IPO Litigation to which Underwriters refer and the SEC complaint noted above did not. The coordinated conduct among Issuer insiders and Underwriters to profit from underpricing IPO shares establishes them as Section 16 insiders—a group collectively owning more than 10 percent of an issuer's securities. *See Roth*, 489 F.3d at 507-08 (detailing group basis for Section 16(a) insider status).

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

None of the targeted insiders in these cases filed Section 16(a) reports. JA 62. Nor have they ever

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profits were not an accidental byproduct of Merrill Lynch's activities alone. It was a coordinated group effort.

publicly disclosed Section 16(a) information in any other manner.

Underwriters repeatedly claim Plaintiff should have known certain "facts" more than two years before these Section 16(b) suits were filed. Pet. Br. 2-3, 16, 42-44. However, Underwriters have yet to identify any Section 16(a) "facts" available anywhere in the public domain. Underwriters do not, and cannot, point to any evidence that the IPO or other litigation revealed the targeted insiders' short-swing trades, profits, group affiliations, and other information required to be disclosed in Section 16(a) reports.

C. Plaintiff's Discovery of Facts Establishing Underwriters' Insider Status

The group conduct among Underwriters and Issuer insiders that establishes them as Section 16 insiders was not revealed through prior litigation. Underwriters assert the IPO Litigation disclosed the facts underlying Plaintiff's Section 16(b) claims. Pet. Br. 41 n.7; Pet. 18. However, Underwriters never show how. They do not cite any document in the record, or otherwise, showing the IPO Litigation revealed the underpricing-based combination among Underwriters and key Issuer decision-makers—facts on which Plaintiff's Section 16(b) cases are specifically based. Nowhere in their three-page description of "The IPO Litigation" do Underwriters even allude to facts regarding group conduct. Pet. Br. 7-10. Nor do group facts appear in the SEC action against Credit Suisse. JA 141-169.

Instead, Underwriters simply repeat the district court's statement that "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. Br. 2, 3, 13, 16, 42, 43. That statement is factually inaccurate, made without any evidentiary hearing or discovery, in the context of a motion to dismiss. Underwriters and key Issuer decision-makers engaged in group conduct in furtherance of a common objective to reap risk-free profits from short-swing trades and an inflated aftermarket. JA 60-61. At best, circumstantial evidence of this group conduct was ascertainable by shareholders willing and able to undertake a thorough, independent investigation only in the period immediately before Plaintiff's suits were filed. Until these Section 16(b) cases, underpricing was widely viewed as a breach by underwriters acting alone. *See, e.g.*, *EBC I, Inc. v. Goldman Sachs & Co.*, 832 N.E.2d 26 (N.Y. App. 2005).

Plaintiff "piece[d] together" the framework of her group-based Section 16(b) claims by analyzing "disparate sources of information."[2] *Litzler*, 362 F.3d at 208. One source included academic literature. *See supra* at 9-10. The IPO underpricing phenomenon has

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[2] This stands in stark contrast to how Congress designed Section 16 to operate. *See infra* at 24-26, 41-43. Section 16 compels disclosure through a Section 16(a) report "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 (citation omitted). "The prophylaxis of Section 16 works by imposing an absolute duty of disclosure upon insiders." *Id*.

drawn considerable academic attention over several decades. *Id.* In the 1980s and 1990s, scholars generally attributed the phenomenon to legitimate business justifications. *See, e.g.*, JA 66 ("The changing risk composition hypothesis, introduced by Ritter (1984), assumes that riskier IPOs will be underpriced by more than less-risky IPOs."). In 2004, Professors Loughran and Ritter introduced the "spinning hypothesis" to explain the anomalous increase in "money left on the table" during the dot-com era. JA 79-83. The spinning hypothesis is based on the conflicts of interest issuer decision-makers have when pricing decisions are influenced by side-payments from investment banks desirous of future business. JA 80.

These academic articles hypothesized only generally what Plaintiff subsequently determined was coordinated group conduct among Underwriters and Issuer insiders. Although the coordinated conduct gives rise to the Section 16(b) violations on which Plaintiff's cases are based, the targeted insiders' actual short-swing trading details have never been disclosed through Section 16(a) reports or otherwise. They remain publicly unknown.

Financial economists have continued their quest to understand the IPO underpricing phenomenon as it relates to the IPOs in these cases—long after Plaintiff 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 Ritter note their analysis of Issuer insiders' involvement in dot-com-era underpricing was delayed "***mainly due to the lack of data***." Xiaoding Lui & Jay Ritter, *The Economic Consequences of IPO Spinning*, 23 Rev. Fin. Stud. 2024, 2025 (2010) (emphasis added). Professors Liu and Ritter first published their conclusions in May 2009 and presented them in September 2009 at the Harvard Law School Forum on Corporate Governance and Financial Regulation. Their conclusions, based on "data gathered from court cases, the media, and documents requested through the Freedom of Information Act," *id.*, support the analytical framework of Plaintiff's Section 16(b) complaints.

None of the critical information regarding Underwriters' and Issuer insiders' coordinated scheme to underprice Issuer IPOs was part of the IPO Litigation or the SEC complaint against Credit Suisse. Yet these group facts were—and remain—an essential part of Plaintiff's claims.

III. PROCEDURAL HISTORY

Plaintiff filed 55 lawsuits in the United States District Court for the Western District of Washington in October 2007. JA 44 (lead complaint). Each alleged Section 16(b) violations stemming from the uniform, coordinated business practices employed by the Underwriters and Issuer insiders described above. JA 54-64. Plaintiff dismissed one case after the issuer was taken private. *See Gollust*, 501 U.S. at 125-26 (explaining Section 16(b) standing requirements). Underwriters filed a motion to dismiss that asserted the remaining 54 suits were time-barred under Section 16(b)'s two-year limitations period. JA 48. The district court granted the motion. JA 50.

The Ninth Circuit reversed. Pet. App. 61a-66a, 71a. Unlike the district court, the Ninth Circuit followed the "fundamental holding" of its long-standing, "thorough" *Whittaker* decision that Section 16(b)'s two-year time limit is tolled until the insider discloses its transactions in a Section 16(a) report. *Id.* 61a, 66a.

Underwriters timely filed a petition for certiorari, which this Court granted on June 27, 2011. JA 41, 42. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

This Court should affirm the Ninth Circuit's decision that Section 16(b)'s two-year time limit is tolled until the insider complies with Section 16(a) and reports its short-swing trading activity. Congress did not intend insiders' noncompliance with Section 16(a) to effectively preclude their Section 16(b) disgorgement liability. Otherwise, Congress' creation of the main Section 16(b) enforcement mechanism would be a nullity. Except for one early decision later renounced, every federal court to have addressed this issue during Section 16(b)'s 77-year history has reached the same conclusion.

This Court should do the same. Unlike other limitations provisions in the 1934 Act, Section 16(b)'s two-year time limit exemplifies a statute of limitations, not a statute of repose. The two-year limit restricts the remedy of a lawsuit to enforce the underlying right afforded by Section 16(b). However, it does not extinguish the underlying right itself. The statutory text and surrounding context confirm this. Whereas the other time limits in the 1934 Act express Congress' desire for absolute repose, the two-year time limit in Section 16 does not.

Section 16's uniqueness was no legislative accident. Congress considered adopting a repose approach for Section 16 as it did in other sections of the 1934 Act. It chose not to. Congress also has had numerous opportunities to amend Section 16 if it disagreed with the federal courts' widespread acceptance of Section 16 tolling. It chose not to. In fact, Congress endorsed these "judicial precedents" when amending Section 16 in 2000.

Underwriters' no-tolling construction contains a fundamental doctrinal mistake. Even if this Court were to construe Section 16(b)'s two-year time limit as a statute of repose, the time limit still would be tolled when the insider has violated Section 16(a). Statutes of repose are subject to legal tolling, as opposed to equitable tolling—and tolling of Section 16(b)'s time limit is legal tolling. It is based on a violation of federal statutory law, not general equitable principles or "background rules," as Underwriters proclaim.

Plaintiff's Section 16(b) cases are timely under any of the parties' or amici's tolling approaches. However, the Court should adopt the approach federal courts have overwhelmingly followed for the last 64 years: tolling until the insider complies with Section 16(a). That approach is most consistent with congressional intent, the legal tolling doctrine, and Section 16(a)'s filing requirement. Unlike the other approaches, it also provides a bright-line, easy-to-apply rule, consistent with this Court's recognition of how Congress designed Section 16 to operate.

ARGUMENT

I. SECTION 16(b)'S TWO-YEAR LIMITATIONS PERIOD IS SUBJECT TO TOLLING WHEN THE INSIDER HAS FAILED TO FILE ITS MANDATORY SECTION 16(a) DISCLOSURE.

A. Underwriters' No-Tolling Construction Ignores Section 16's Text and the Core Congressional Purpose of Curbing Short-Swing Speculation by Corporate Insiders.

1. The Text

Congress, through Section 16(b), bestowed on issuers the entitlement to any profits from short-swing transactions by statutory insiders as defined in Section 16(a). 15 U.S.C. § 78p(b). As stated in the first sentence of Section 16(b):

> For the purpose of preventing the unfair use of information which may have been obtained by [a Section 16(a) insider], ***any*** profit realized by him from ***any*** [short-swing transaction in issuer equity securities] ***shall inure to and be recoverable by*** the issuer.

Id. (emphasis added). In the second sentence of Section 16(b), Congress established a two-year limitations period for one remedial mechanism through which an issuer may exercise its right to obtain those profits: a lawsuit against the insider. *Id.* The time-limit clause of that sentence provides that "no such suit shall be brought more than two years after the date such profit was realized." *Id.*

Underwriters isolate the time-limit clause, viewing the text with complete disregard for the textual context of Section 16 as a whole. Yet even the bare text of the time-limit clause reveals a limitation provision "typical" of a statute of limitation, not a statute of repose. "The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998). "[T]ypical statutes of limitations" read "no action shall be brought . . . ." *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1186 (1950); *see also Jones v. Bock*, 549 U.S. 199, 220 (2007) ("Statutes of limitations . . . are often introduced by a variant of the phrase 'no action shall be brought.'"). That is precisely how the clause in Section 16(b) reads: "no such suit shall be brought . . . ."[3] 15 U.S.C. § 78p(b).

Statutes of repose, on the other hand, talk "not of a suit's commencement but of a right's duration." *Beach*, 523 U.S. at 417; *see also Margolies v. Deason*, 464 F.3d 547, 551 (5th Cir. 2006) (statutes of repose "eliminate the underlying right"). Section 16(b)'s time-limit clause does not address the duration of an issuer's underlying right to an insider's short-swing profits. It addresses only the time to bring a lawsuit to recover such profits. 15 U.S.C. § 78p(b) ("no such suit shall be

[3] No party disputes that statutes of limitations are "customarily" subject to tolling. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)).

brought" referring to "[s]uit to recover such profit"). A lawsuit is not the exclusive remedial means by which an issuer may assert its right to short-swing profits. Another is offset or recoupment. The time-limit clause does not bar an issuer from recouping an insider's short-swing profits by offsetting them against related amounts otherwise owed to the insider, even if the insider realized the short-swing profits more than two years before the claimed offset. *Beach*, 523 U.S. at 415 (describing "general" rule that, absent "clearest congressional intent to the contrary," recoupment claim may offset damages even if claim is based on expired right); *Reiter v. Cooper*, 507 U.S. 258, 264 (1993) (same).

In short, based on the text alone, Section 16(b)'s time-limit clause is not a statute of repose because it does not extinguish the issuer's underlying right.

2. The Text of Section 16 as a Whole

Underwriters' no-tolling construction ignores the text of Section 16 as a whole. Context is crucial when interpreting Section 16(b) specifically and the federal securities laws generally. *Gollust*, 501 U.S. at 124 (reading Section 16(b) terms "in context" with legislative history and purpose); *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 466 (1969) (meanings of words in 1934 Act "must be determined in context"); *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1800-01 (2010) (Scalia, J., concurring) (discussing importance of legislative context to understand text); *Whittaker*, 639 F.2d at 528-30 (examining legislative context, including Section 16 purpose and structure as a whole). Statutes must be "read as a whole." *King v.*

St. Vincent's Hosp., 502 U.S. 215, 221 (1991). The meaning of statutory text, "plain or not, depends on context." *Id*. Courts, therefore, should interpret statutory text that "best harmonizes with context" and promotes the "policy and objectives" of Congress. *Id.* at 221 n.10 (summarizing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868)).

The context of Section 16 as a whole demonstrates the significance of the subsection (a) disclosure requirement to the subsection (b) enforcement scheme. The 1934 Act implemented a "legislative philosophy" of "full disclosure." *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). This disclosure philosophy is embodied in the text of all four subsections of Section 16 as originally enacted in 1934.

In subsection (a), Congress explicitly required the insider to disclose beneficial ownership and transaction details in SEC filings. 15 U.S.C. § 78p(a).

In subsection (b), Congress created a private action for disgorgement of profits obtained by subsection (a) insiders as a result of short-swing insider trading. 15 U.S.C. § 78p(b). Sections 16(a) and (b) are "interrelated." *Reliance Elec.*, 404 U.S. at 426. Congress enacted Section 16(b) to prevent "the unfair use of information which may have been obtained by [a Section 16(a) insider] by reason of his relationship to the issuer." *Id.* (quoting 15 U.S.C. § 78p(b)). In doing so, Congress "grammatically" linked Section 16(b)'s time limit with Section 16(a)'s disclosure obligation. Arnold Jacobs, *Section 16 of the Securities Exchange Act* § 1:1 (2006). The time-limit clause 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." 15 U.S.C. § 78p(b) (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), which sets out the persons required to file Section 16(a) reports. Contrary to Underwriters' no-tolling construction, Sections 16(a) and (b) ***must*** be read together. *Foremost-McKesson*, 423 U.S. at 234 n.1 (noting Section 16(a) defines those subject to Section 16(b)).

In subsection (c), Congress further ensured that insiders could not escape subsection (a)'s disclosure requirements. 15 U.S.C. § 78p(c). Congress included subsection (c) to prohibit a form of shorting issuer stock known as "selling against the box." H.R. Rep. No. 1383, at 24-25 (1934). Selling against the box occurs when "those in possession of inside information sell their holdings but keep the stock registered in their name, so that their change of position does not become known until delivery is made at a later date." *Id.* at 25. At the time, insiders commonly sold against the box to effectively sell stock and lock in a profit, without having to sell shares held in the insider's name—***or disclose those sales***. *Stock Exchange Regulation: Hearing Before Comm. on Interstate & Foreign Commerce on H.R. 7852 and H.R. 8720*, 73rd Cong. 133-35 (1934) (testimony of Thomas Corcoran) [hereinafter "*Interstate & Foreign Commerce Comm. Hearings*"]. Selling against the box, if permitted, would allow insiders to "conceal" their sales of issuer securities, contrary to Section 16(a). *Id.* at 134. However, shareholders "ought to be in a position where they can know" about those transactions. *Id.* at 135. Subsection (c) prohibited sales against the box to ensure that all insider sales of issuer securities would be reported under subsection (a).

In subsection (d), Congress, likewise, demonstrated its intent to link the subsection (a) disclosure requirement with the other Section 16 subsections. The 1934 Act originally contained a one-sentence subsection (d) (now subsection (e), following the 1964 amendments) relating to arbitrage. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 16(d), 48 Stat. 881 (1934) (now codified at 15 U.S.C. § 78p(e)). Arbitrage "refers to a specialized form of trading which is said to be based upon disparity in quoted prices of the same or equivalent commodities, securities, or bills of exchange." *Falco v. Donner Found., Inc.*, 208 F.2d 600, 603 (2d Cir. 1953). Subsection (d) exempted certain arbitrage transactions from Section 16, including Section 16(a)'s reporting provisions, unless the SEC adopted rules to the contrary. The SEC adopted such a rule immediately after Congress passed the 1934 Act. Romeo & Dye, *supra*, § 15.03[4] (summarizing history). The rule prohibits arbitrage transactions unless the insider reports them "in the statements required under Section 16(a)" and disgorges any short-swing profits "as provided in Section 16(b)." 17 C.F.R. § 240.16e-1.

In sum, Congress' legislative philosophy of "full disclosure" runs through the text of each of the four original subsections of Section 16. This context underscores the significance of Section 16(a)'s disclosure requirement to Section 16(b)'s enforcement mechanism. Underwriters' no-tolling construction ignores this context.

3. Congressional Purpose

Federal courts—***for over six decades***—have read Section 16(b)'s time-limit clause differently than Underwriters. Each of these courts tolls the two-year time limit when the targeted insiders have failed to file Section 16(a) reports. *Litzler*, 362 F.3d at 207-08; *Whittaker*, 639 F.2d at 527-30; *Capitol First Corp. v. Todd*, No. 04-6439 (MLC), 2006 WL 3827329, at *11 (D.N.J. 2006); *Dreiling v. Am. Online, Inc.*, No. C05-1339JLR, 2005 WL 3299828, at *4 (W.D. Wash. Dec. 5, 2005); *Segen v. Comvest Venture Partners, LP*, No. Civ.A. 04-822 JJF, 2005 WL 1320875, at *3-4 (D. Del. June 2, 2005); *Tyco Int'l Ltd. v. Kozlowski*, No. MDL 02-1335-B, 2005 WL 927014, at *3-4 (D.N.H. Apr. 21, 2005); *Dreiling v. Am. Express TRS Co., Inc.*, 351 F. Supp. 2d 1077, 1082-83 (W.D. Wash. 2004); *Rosen ex rel. Egghead.com, Inc. v. Brookhaven Capital Mgmt., Co., Ltd.*, 179 F. Supp. 2d 330, 335-39 (S.D.N.Y. 2002); *Morales v. Executive Telecard, Ltd.*, No. 95 Civ. 10202(KMW), 1998 WL 314734, at *2-3 (S.D.N.Y. June 12, 1998); *Shattuck Denn Mining Corp. v. La Morte*, No. 67 Civ. 3222, 1974 WL 373, at *2 (S.D.N.Y. Mar. 8, 1974); *Blau v. Albert*, 157 F. Supp. 816, 818-19 (S.D.N.Y. 1957); *Grossman*, 72 F. Supp. at 377-78; *Dreiling v. Kellett*, No. C01-1528P, Dkt. 114, slip op. 8-9 (W.D. Wash. Feb. 14, 2003) [JA 203-214].[4]

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[4] The one exception is *Carr-Consolidated Biscuit Co. v. Moore*, 125 F. Supp. 423 (M.D. Pa. 1954). As noted by the Ninth Circuit 27 years later, however, *Carr-Consolidated* relied on a limitations period theory later "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 similarly have declined to follow *Carr-Consolidated* on the issue. *See, e.g.*, *Capitol First*, 2006 WL 3827329 at *11.

Even if the Court were to deem Underwriters' "alternative" construction of Section 16 "possible," the Court should give "the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders." *Reliance Elec.*, 404 U.S. at 424. That construction unquestionably favors Plaintiff. The core congressional purpose of "curbing the evils of insider trading" unites Sections 16(a) and (b). Jacobs, *supra*, § 1:1. Congress intended Section 16(a) to provide the information necessary to trigger Section 16(b) enforcement. 26 Michael Kaufman, *Securities Litigation: Damages* § 8:7 (2010); 2 Thomas Hazen, *Treatise on the Law of Securities Regulation* § 12.2 (1990).

This Court similarly has recognized that Section 16(b) can be enforced as Congress intended "***if*** [shareholders] find out that any such [short-swing] transactions are going on." *Gollust*, 501 U.S. at 125 n.7 (emphasis added) (quoting *Interstate & Foreign Commerce Comm. Hearings*, *supra*, 73rd Cong. 136 (testimony of Thomas Corcoran)). The only way to "find out" about purely private transactions is through Section 16(a) disclosure. These federally mandated reports "provide the basic information for seeking recovery of short-swing profits under Section 16(b)." Peter Romeo, *Insider Reporting & Liability Under Section 16 of the Securities Exchange Act of 1934* § II.A.2 (1987). They are "essential" to Section 16(b) enforcement:

> Without [Section 16(a)] reports, the information necessary to determine the existence of a possible short swing violation would not be available to the issuer and its stockholders, who are charged with enforcing Section 16(b).

Id. § II.A.6. They are the "main source of information" for suits Congress empowered shareholders to bring under Section 16(b). *Whittaker*, 639 F.2d at 528.

Congress understood when it enacted the 1934 Act that Section 16(b) enforcement presumes Section 16(a) compliance. In congressional hearings, Thomas Corcoran, a "principal drafter of the statute," *Gollust*, 501 U.S. at 125 n.7, testified:

> MR. MERRITT. Well, of course, as a matter of fact, as a matter of actual practice, if I sell my own stock, the stockholders are not going to know whether I sell or not.
>
> MR. CORCORAN. No; but the stockholders ought to be in a position where they can know, and under section 15(a) [now Section 16(a)] they would be.
>
> MR. MERRITT. Any time a director sells some stock, he does not send a notice to all of the stockholders that he has sold his stock?
>
> MR. CORCORAN. No; not everyone; but once a month [now within two days of trading] the bill would require him to report what his stock changes are. Otherwise the insider is at a decided advantage.

Interstate & Foreign Commerce Comm. Hearings, *supra*, 73rd Cong. 135; *see also* SEC Interpretative Release, 46 Fed. Reg. at 481472 (Congress understood Section 16(a) reports would foster Section 16(b) enforcement because the reports "may reveal insider purchases and sales of securities which are subject to the profit recovery provision" of Section 16(b).).

The only two circuit courts to have considered the question agree that Congress' core 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 has held that "to 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. Section 16(b)'s "prophylaxis" "works by imposing an absolute duty of disclosure upon insiders" under Section 16(a). *Id.* at 208. The Ninth Circuit similarly has held that 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." *Whittaker*, 639 F.2d at 528. Section 16(b)'s "short" two-year limitations period "is understandable only in the context of the insider's duty to make prompt disclosure" in Section 16(a) reports. *Id.*

Underwriters argue "there is no reason to toll the time limit for filing an action under Section 16(b) until a defendant files a Section 16(a) disclosure" because Section 16(a) can be enforced in other ways, including "criminal sanctions" under Section 32. Pet. Br. 33-34. However, "[n]ot every violation of 16(a) is denounced as a crime by Sec. 32." *Grossman*, 72 F. Supp. at 379.

Even if criminal and civil sanctions were coextensive, an insider who has violated both Sections 16(a) and (b) should not be placed in a better position than one who has violated only Section 16(b). *Id.* Regardless, the government has rarely, if ever, invoked criminal sanctions "because it believes its first effort should be directed toward obtaining the disclosure of the information withheld." Cook & Feldman, *supra*, at 406. In the words of Justice Brandeis: "Sunlight is the best disinfectant." Louis Brandeis, *Other People's Money* 92 (1932).

B. Original and Continued Congressional Intent Establishes a Tollable Two-Year Time Limit When Section 16(a) Reports Have Not Been Filed.

1. Original Congressional Intent

Underwriters rely on the Court's use of the phrase "period of repose" when referencing Section 16(b) in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Pet. Br. 2-3. In *Lampf*, this Court rejected application of "equitable tolling" to claims arising under Section 10(b) of the 1934 Act. 501 U.S. at 363. Because Section 10(b) does not expressly contain a limitations period, the Court analyzed other causes of action in the 1934 Act, including those that incorporated some variation of a two-prong time limit (a one-year discovery period coupled with a three-year period of repose). *Id.* at 359-62.

Underwriters repeatedly mischaracterize the two-prong time limits as "companion" limitations periods to Section 16(b). Pet. Br. 3, 15, 21, 22, 24-25. The Court in *Lampf* was clear that they are not. Section 16(b) "differs in focus" from the other types of claims available under the 1934 Act, including those arising under Section 10(b). *Lampf*, 501 U.S. at 360 n.5. As a result, Section 16(b) was ***not*** "an appropriate source from which to borrow a limitations period." *Id.*

The Court correctly viewed Section 16 as unique. The two-prong limitations provisions contain language that materially differs from Section 16(b). *Compare* 15 U.S.C. §§ 78i(e), 77m, 78r(c), *and* 28 U.S.C. § 1658(b), *with* 15 U.S.C. § 78p(b). *See also Merck*, 130 S. Ct. at 1790, 1795; *Lampf*, 501 U.S. at 360. The two-prong provisions include express discovery rules focused on the ***plaintiff*** (whether the plaintiff, or a reasonably diligent plaintiff, discovered certain facts supporting the cause of action). 15 U.S.C. §§ 78i(e), 77m, 78r(c); 28 U.S.C. § 1658(b); *Merck*, 130 S. Ct. at 1790, 1795; *Lampf*, 501 U.S. at 360. Section 16 contains its own, differently worded, two-year time limit, ***no*** discovery rule, and, instead, a unique disclosure obligation focused on the ***defendant*** (whether the defendant disclosed short-swing transactions in Section 16(a) reports). 15 U.S.C. § 78p.[5]

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[5] Underwriters contend that the two-prong limits in other parts of the 1934 Act show Congress knew how to draft a discovery rule if it wanted to and that Congress must not have wanted to with Section 16 because it did not use similar language. Pet. Br. 19, 21-22. However, Congress did not intend to create a discovery rule with Section 16 in the first place. Tolling the time limit when an insider fails to file a Section 16(a) disclosure has nothing to do with whether a ***plaintiff*** discovers the claim (or even reads a Section 16(a) report). Tolling is based on a ***defendant***'s statutory reporting violation. *See infra* at 39-44.

The difference between Section 16(b)'s time limit and the two-prong time limits in other sections of the 1934 Act was not lost on Congress during the original drafting of the legislation. Congress considered—and then ***rejected***—repose language for Section 16(b) that mirrored every other time limit in the 1934 Act. The drafting sequence is unambiguous. An April 13, 1934 draft House bill contains the first indication of congressional consideration of a limitations period for Section 16(b) (then Section 15(a)). H.R. Comm. on Interstate & Foreign Commerce, 73rd Cong., Securities Exchange Bill 48 (Subcomm. Print Apr. 13, 1934).[6] The draft bill contains handwritten notes reflecting a desire to add a two-prong limitations provision akin to the other sections of the 1934 Act: "6 mo. if disclosed under (a), otherwise 3 years." *Id.* In an April 18, 1934 print, the two-prong limitations provision had been typed for further consideration using the following language: "No such suit may be brought more than six months after such profit was realized if the facts upon which such suit was based were disclosed by a statement filed pursuant to subsection (a), or more than three years after such profit was realized if the facts were not so disclosed." H.R. Comm. on Interstate & Foreign Commerce, 73rd Cong., Securities Exchange Bill 51 (Subcomm. Print Apr. 18, 1934). This two-prong time-limit language was then deleted in the April 26, 1934 print. H.R. Comm. on Interstate & Foreign Commerce, 73rd Cong., Securities Exchange Bill 40-41 (Comm. Print Apr. 26, 1934). Finally, a

[6] The legislative history documents discussed herein were located at the National Archives and SEC, and are not readily accessible to the public. The parties have lodged them with the Clerk of this Court.

comparative print reflecting the differences between the House bill with the deleted language and the Senate version shows, for the first time, an intent to consider alternative "statute of limitations" language: "no such suit shall be brought more than 2 years after the date such profit was realized." Comm. of Conf., 73rd Cong., Securities Exchange Act of 1934 48 (Comparative Print Apr. 26, 1934). This was the language on which Congress settled.

Underwriters acknowledge that Congress chose not to adopt two-prong limitations language but nevertheless maintain that Congress "adopted a repose approach." Pet. Br. 25. However, the two-prong limitations language ***was*** Congress' "repose approach." When Congress wanted to incorporate a "repose approach" in the 1934 Act, it drafted two-prong limitations provisions every time. It considered, but rejected, that language for Section 16(b). Congress therefore must have had a different intent with Section 16(b).[7] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact

[7] Underwriters speculate that "Congress would not have given repose to defendants who may have engaged in knowing securities violations" of other 1934 Act provisions but denied repose to defendants who committed an "innocent" Section 16(b) violation. Pet. Br. 23. However, when plaintiffs will not usually be aware of an injury at the time of defendant's conduct, "avoidance of the injustice" "would seem of greater moment than the desirability of repose." *Developments in the Law: Statutes of Limitations*, *supra*, at 1204. Section 16(b) is unique in that there is no external event noticeable by shareholders to indicate a potential claim, e.g., a sudden drop in an issuer's stock price. Section 16(a) disclosures provide the only realistic opportunity for shareholders to learn of short-swing insider trading.

statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Federal courts had this same understanding as early as 1981 when *Whittaker* was decided. The Ninth Circuit in *Whittaker* accurately forecasted this Court's decision in *Lampf* that the other time limits in the 1934 Act (all two-pronged) contained a three-year period of "absolute" repose not subject to tolling. *Whittaker*, 639 F.2d at 530. However, "the absence of similar language creating a maximum time limit in § 16(b) shows Congress contemplated tolling" when Section 16(a) reports have not been filed. *Id.*

2. Continued Congressional Intent

Underwriters mischaracterize Section 16 tolling as "novel." Pet. Br. 35. Numerous federal courts throughout the country have considered the issue over Section 16's 77-year history. *See supra* at 23 (listing cases). With only one exception later "renounced," each court reached the same conclusion: the two-year time limit for Section 16(b) claims is tolled when Section 16(a) information has not been disclosed. *Id.*

Of all these decisions, none has analyzed Section 16's text, context, structure, and legislative history, and case law as thoroughly as *Whittaker* did 30 years ago. The case has achieved landmark status in Section 16 jurisprudence as a result. After *Whittaker*, every

Section 16(b) case throughout the country that examined the two-year period adopted *Whittaker*'s fundamental analysis and concluded that the time limit is tolled when the targeted insiders have not complied with Section 16(a). *Id.* The leading Section 16 commentators have consistently trumpeted *Whittaker*'s holding and rationale. *See*, *e.g.*, William Wang & Marc Steinberg, *Insider Trading* § 14:3 (2008) (analyzing various approaches, including "*Lampf* argument," and concluding that, given "congressional intent underlying section 16," courts should adopt *Whittaker*'s "disclosure rationale" requiring tolling until a Section 16(a) report is filed); Romeo & Dye, *supra*, § 9.03[3][b]; Jacobs, *supra*, § 3:52.

Congress revisited Section 16 on several occasions during this same three-decade time period. *See, e.g.*, Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-365 (2000); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Each time, Congress declined to amend Section 16 and alter the widespread acceptance of tolling. This "silence" constitutes strong continuing congressional intent that Section 16(b)'s limitations period is subject to tolling when Section 16(a) reports have not been filed. *Gulf Oil*, 419 U.S. at 200-01 (concluding "continued congressional silence" despite "long-standing interpretation" of federal statute shows long-standing interpretation is consistent with congressional intent); *United States v. Heredia*, 483 F.3d 913, 918-19 (9th Cir. 2007) (holding congressional inaction following "widespread acceptance" of "long-standing" judicial precedent shows Congress' "acquiescence" in such precedent).

(a) Commodity Futures Modernization Act of 2000

The Commodity Futures Modernization Act of 2000 ("CFMA") amended Section 16 in two respects. Congress amended Section 16(a) to include a reporting requirement for a purchase or sale of "a security-based swap agreement," and amended Section 16(b) to include a disgorgement obligation on an insider who profits from a short-swing transaction in "a security-based swap agreement." CFMA § 303(g), 114 Stat. at 2763A-455 to 456 (codified at 15 U.S.C. 78p(a), (b)). In the words of principal sponsor Senator Gramm, the CFMA "will now allow new and important financial products – single stock futures – to be sold in America. It protects financial institutions from over-regulation, and provides legal certainty for the $60 trillion market in swaps." 146 Cong. Rec. S11855, 11866 (daily ed. Dec. 15, 2000).

The CFMA also prohibited the SEC from imposing ***any*** reporting requirement on security-based swap agreements, ***except one***: Section 16(a). CFMA § 303(a), 114 Stat. at 2763A-453 (codified at 15 U.S.C. 78c-1(b)(3)). Former SEC Chairman Arthur Levitt had stressed the critical need for maintaining an insider reporting requirement for the soon-to-be-allowed swap agreements:

> Without direct authority over the futures exchange ***or a requirement for insider reporting***, the SEC may have difficulty ***ever*** learning of the futures purchase by the insider. Such activities could destroy years of

> Commission efforts to protect investors from insider trading abuses.

Testimony Concerning S. 2697 Before the Senate Comm. on Agriculture, Nutrition, and Forestry and Comm. on Banking, Housing, and Urban Affairs, 2000 WL 900794, at *6 (June 21, 2000) (emphasis added).[8] In sum, Congress relied on Section 16 to ensure that "[i]nsider trading provisions of the Securities Exchange Act will be applied to single stock futures transactions." 146 Cong. Rec. S11855, 11867 (daily ed. Dec. 15, 2000) (statement of Senator Gramm). However, Congress left undisturbed the federal courts' longstanding treatment of Section 16's two-year time limit.

Congress is presumed to enact or amend statutes with knowledge of "relevant judicial precedent." *Merck*, 130 S. Ct. at 1795-96; *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951). There is no need to presume such knowledge with the CFMA however. Congress incorporated relevant Section 16 "judicial precedents" explicitly:

> Judicial precedents decided under section . . . 78p [Section 16] of this title, and judicial rules promulgated under such section[], shall apply to

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[8] Amici curiae supporting Underwriters charge that the "specialized plaintiffs' bar has all the resources needed to detect legitimate claims under Section 16(b)" without Section 16(a). Br. for Chamber of Commerce, et al. as Amici Curiae 21. Yet Chairman Levitt's testimony demonstrates that "incentives" and "resources"—even at the SEC's scale —matter little when it comes to learning of insiders' securities transactions.

> security-based swap agreements to the same extent as they apply to securities.

CFMA § 303(d), 114 Stat. at 2763A-454 (codified at 15 U.S.C. § 78j). Congress would not have expressly subjected trading in swap agreements to Section 16 "judicial precedents" if it disagreed with the widespread acceptance of *Whittaker*.

(b) Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") shortened the filing deadline under Section 16(a) from ten days after the end of the month in which the transaction occurs, to two days from the date of the transaction. *Compare* 15 U.S.C. § 78p(a) (2000), *with* Sarbanes-Oxley § 403(a), 116 Stat. at 788 (codified at 15 U.S.C. § 78p(a)(2)(C)). Although amending subsection (a), Congress again left undisturbed the two-year limitations period in subsection (b). By this time, federal courts had widely interpreted Section 16(b) as subject to tolling for more than two decades.

Sarbanes-Oxley also addressed the limitations periods for suits brought under Section 10(b). Sarbanes-Oxley § 804(a), 116 Stat. at 801 (codified at 28 U.S.C. § 1658(b)). Congress ***lengthened*** Section 10(b) post-*Lampf* from the one-year/three-year period to a two-year/five-year period because the old limitations period "is so short, the worst offenders may avoid accountability and be rewarded if they can successfully cover up their misconduct for merely three years [and] [t]he more complex the case, the easier it will be for these wrongdoers to get away with fraud." 148 Cong. Rec. S6524, 6528-29 (July 10, 2002) (testimony of Senator McCain). Congress had no reason to have this same concern about Section 16(b)'s two-year period given the widespread acceptance of *Whittaker*.

In short, Congress has examined Section 16 on several occasions over the last few decades. Over the course of those decades, courts throughout the country have consistently followed *Whittaker* and tolled Section 16(b)'s two-year limitations period when no Section 16(a) report has been filed. Congress never expressed disagreement with these "judicial precedents"—in fact, it has explicitly endorsed them. This shows conclusive continuing congressional intent that Section 16(b) is subject to tolling when insiders fail to file Section 16(a) reports.

C. Section 16(b)'s Limitations Period Is Subject to Section 16 Tolling Even if Construed as a Statute of Repose.

1. Equitable Versus Legal Tolling

Equitable tolling is a judicially created doctrine that keeps a statute of limitations from running in situations involving unfairness or excusable mistake. *Lampf*, 501 U.S. at 363; *Joseph v. Wiles*, 223 F.3d 1155, 1166 (10th Cir. 2000); *Arivella v. Lucent Techs.*, 623 F. Supp. 2d 164, 176 (D. Mass. 2009). *Lampf* held that "the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure" in the 1934 Act. 501 U.S. at 363. Equitable tolling is "unnecessary" to the one-year period because it contains its own express discovery rule. *Id.* Equitable tolling also is "inconsistent" with the three-year period of repose because it is meant "clearly to serve as a cutoff." *Id.* *Lampf* did not address the doctrine of legal tolling.

Equitable tolling is distinct from legal tolling. *Joseph*, 223 F.3d at 1166; *Arivella*, 623 F. Supp. 2d at 176. "The Financial Institutions"—including many Underwriters herein—"have blurred the distinction between legal tolling . . . and equitable tolling." *In re Enron Corp. Secs. Deriv. & ERISA Litig.*, 529 F. Supp. 2d 644, 707 (S.D. Tex. 2006). "[T]hey refer to both as equitable tolling. They are not the same." *Id.* Legal tolling is predicated on application of law, not general principles of equity. Legal tolling may be "derived from a statutory source." *Arivella*, 623 F. Supp. 2d at 176.

2. Statutes of Repose Are Subject to Legal Tolling.

Unlike equitable tolling, legal tolling is not inconsistent with statutes of repose. *Joseph*, 223 F.3d at 1167; *Arivella*, 623 F. Supp. 2d at 176. The distinction between legal and equitable tolling has surfaced most frequently when courts have decided whether statutes of repose are subject to tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). *American Pipe* held that the commencement of the original class suit tolls the running of a statute of limitation for all purported class members who make timely motions to intervene after the court has declined class certification. 414 U.S. at 553. The Court extended *American Pipe* to putative class members who seek to file individual suits after denial of class certification. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

Federal courts have determined consistently that "*American Pipe* tolling" applies to statutes of repose—consistent with *Lampf*—because *American Pipe* tolling is legal, not equitable, in nature. *See, e.g.*, *Joseph*, 223 F.3d at 1166 (legal tolling of statute of repose in Section 10(b) of 1934 Act); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010) (accepting legal tolling of repose statutes in Securities Act of 1933); *Arivella*, 623 F. Supp. 2d at 177-78 (legal tolling of statute of repose in Section 413 of Employee Retirement Income Security Act of 1974); *Andrews v. Chevy Chase Bank, FSB*, 243 F.R.D. 313, 316-37 (E.D. Wis. 2007) (legal tolling of repose period for rescinding home loans in Truth in Lending Act); *In re Enron Corp. Secs. Deriv. & ERISA Litig.*, 465 F. Supp. 2d 687, 717 (S.D. Tex. 2006) (legal tolling of statutes of repose in 1934 Act); *Ballard v. Tyco Int'l, Ltd.*, No. MDL 02-MD-1335-PB, 2005 WL 1683598, at *7 (D.N.H. July 11, 2005) (legal tolling of statutes of repose in 1934 Act); *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 30-32 (S.D.N.Y. 2002) (legal tolling of statute of repose in state fraudulent transfer act); *see also Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 535, 538 (9th Cir. 2011) (noting weight of federal authority favors view legal tolling of statutes of repose post-*Lampf*; certifying question to state court for final analysis under state law); *Bright v. United States*, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010) (holding "jurisdictional" statute subject to *American Pipe* tolling because it constitutes legal/statutory, not equitable, tolling).[9]

[9] The Southern District of New York is the only court to reach a different conclusion. *See Footbridge Ltd. Trust v. Countrywide*

American Pipe is properly viewed as "a species of legal tolling" because the tolling "is derived from a statutory source," not equitable principles. *Arivella*, 623 F. Supp. 2d at 176 (quoting *Newport v. Dell, Inc.*, No. CV08-0096-TUC, 2008 WL 4347311, at *4 n.8 (D. Ariz. Aug. 21, 2008)); *see also Stone Container Corp v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000) (noting Fed. R. Civ. P. 23, like all federal civil court rules, is "as binding as any federal statute" (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988))).

3. Tolling When Insiders Fail to Comply With Section 16(a) Is Legal, Not Equitable, Tolling.

Section 16 tolling is properly viewed, like *American Pipe* tolling, as a species of legal, not equitable, tolling. Section 16 tolling is based on application of a federal statute—Section 16(a)—not principles of equity. *Whittaker*, 639 F.2d at 527-30. In *Whittaker*, the Ninth Circuit examined three interpretations of Section 16(b)'s two-year time limit: strict no-tolling,

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Fin. Corp., 770 F. Supp. 2d 618 (S.D.N.Y. 2011) (determining *American Pipe* tolling does not apply to statute of repose in Section 13 of 1934 Act). *Footbridge* reasoned *American Pipe* applied equitable, not legal, tolling and relied on the time-limit language "in no event" to conclude that Section 13 provides for a period of absolute repose. *Id.* at 624. Regardless of the basis of *American Pipe* tolling, tolling based on Section 16(a) is clearly legal, not equitable, in origin for the reasons discussed above. Further, Section 13's "in no event" language appears throughout the 1934 Act but is nowhere to be found in Section 16(b). Congress considered such language when drafting Section 16(b)—i.e., clear-cut repose language—but rejected it. *See supra* at 29-30.

"notice" or "discovery," and "disclosure." *Id.* The court concluded the disclosure interpretation—tolling until the insider discloses its transactions in statutorily-mandated Section 16(a) reports—best comports with congressional intent. *Id.* The Ninth Circuit did not label the tolling as "legal" or "equitable." However, its rationale is grounded in the legal requirement that insiders disclose their short-swing trading activities under Section 16(a), not generalized equitable principles.[10] *Id.* The court only mentioned "equitable tolling" in a footnote regarding fraudulent concealment theory as a mere "step in the analysis toward the disclosure interpretation." *Id.* at 527 n.9. The disclosure interpretation itself, however, depends on application of Section 16—specifically that "§ 16(b) is interrelated with the congressionally created reporting requirements of § 16(a)." *Id.* at 530.

Tolling the two-year period for Section 16 disgorgement claims when insiders do not comply with

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[10] Were there ever a case where equities favored an insider who failed to comply with Section 16(a), it might well have been *Whittaker* itself. The district court entered factual findings after trial "that various corporate officers had information which put the Corporation [the Section 16(b) claimant] on notice through the relevant trading period." *Whittaker*, 639 F.2d at 527; *see also Whittaker v. Whittaker Corp.*, No. 77-2297, 1977 U.S. Dist. LEXIS 16777, at *23-26 (C.D. Cal. Mar. 22, 1977) (summarizing actual notice evidence). The trial court then applied the notice rule and dismissed a portion of the plaintiff's claim as beyond the limitations period. *Whittaker*, 1977 U.S. Dist. LEXIS 16777, at *26; *see also Whittaker*, 639 F.2d at 527. The Ninth Circuit reversed—but not because the trial court lacked sufficient notice evidence or failed to balance the parties' equities properly. It reversed because Section 16(a) noncompliance tolls Section 16(b)'s time limit. This is legal, not equitable, tolling.

Section 16(a) is "consonant with the legislative scheme." *Am. Pipe*, 414 U.S. at 557-58; *Whittaker*, 639 F.2d at 527 (citing *Am. Pipe*, 414 U.S. at 556-59). The text, context, and original and continuing congressional intent support tolling when Section 16(a) reports have not been filed. *See supra* at 17-36. Tolling respects Section 16(a)'s requirement that insiders affirmatively disclose their short-swing transactions. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (Complementing the "principle that courts are to interpret the words of a statute in context" is the "rule" that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). Congress placed the responsibility for observing Section 16(a) and Section 16(b) on the insider. *See Whiting v. Dow Chem. Co.*, 523 F.2d 680, 687 (2d Cir. 1975) (insiders have no one to blame but themselves). Underwriters' no-tolling rule would change the insiders' burden of affirmative disclosure into an impossible burden of discovery onto shareholders (those to whom Congress gave "ultimate" Section 16(b) enforcement authority). *Gollust*, 501 U.S. at 122.

Congress intended Section 16 to operate "mechanically"—a "crude rule of thumb" that can be easily applied in an "objective," "bright-line" fashion. Jacobs, *supra*, § 3:1; *see also Gollust*, 501 U.S. at 122 (Section 16(b) requires "mechanical" application); *Foremost-McKesson*, 423 U.S. at 251 (Congress intended Section 16 to be easy-to-apply, "crude rule of thumb"); *Reliance Elec.*, 404 U.S. at 422 (Congress intended Section 16 to be capable of easy administration, applied with "objective standards"); *Litzler*, 362 F.3d at 208 ("Section 16 compels disclosure . . . so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two."); *Colan v. Mesa Petroleum Co.*, 951 F.2d 1512, 1519 (9th Cir. 1991) (summarizing authorities showing Congress meant Section 16 as "bright-line" rule); *Whittaker*, 639 F.2d at 529 (Congress intended "to impose absolute accountability within clearly demarcated boundaries," a "goal" "served by a limitations period which can be mechanically calculated from objective facts").

The connection between Section 16(b)'s profit-disgorgement provision with Section 16(a)'s disclosure obligation provides "the certainty of operation of the statute that Congress was seeking when creating such a crude 'rule of thumb' [and is] in keeping with the 'objective measure of proof' contemplated by Congress." Wang & Steinberg, *supra*, § 14:6.3 (citing *Smolowe v. Delendo Corp.*, 136 F.2d 231, 235 (2d Cir. 1943); *Stock Exchange Practices, Hearings Before Senate Comm. on Banking & Currency*, 73 Cong. 6557 (1934) [hereinafter "*Banking & Currency Comm. Hearings*"]; 5 Louis Loss & Joel Seligman, *Securities Regulation* 2321-2482 (2001)); *see also Whittaker*, 639 F.2d at 529. Like Fed. R. Civ. P. 23 tolling, Section 16 tolling "involves a simple mathematical computation." *Arivella*, 623 F. Supp. 2d at 179. There is no "reasonableness" or "diligence" inquiry; it is purely objective. *Id.* A Section 16(a) report is either filed or not filed. Tolling is keyed off the filing date. A court need only apply "simple math" to determine the two-year period. *Id.* Shareholders also know where to find Section 16(a) reports without having to search "disparate sources of information."[11] *Litzler*, 362 F.3d at 208.

Two salutary benefits flow from such a bright-line rule. First, courts can take judicial notice of Section 16(a) reports. *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006); *Payne v. DeLuca*, 433 F. Supp. 2d 547, 565 n.11 (W.D. Pa. 2006). They can, therefore, resolve Section 16 tolling issues early in litigation as the Ninth Circuit did here. *See, e.g.*, JA 213-214; *Am. Express*, 351 F. Supp. 2d at 1082-83. Second, Section 16 tolling allows shareholders to easily and accurately assess the limitations issue before making a pre-suit demand and commencing litigation under Section 16(b). Romeo & Dye, *supra*, § 9.03[3][b] ("[T]olling until all security holders are given the information in a Section 16(a) report . . . is essential to an informed evaluation of a potential claim.").

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[11] The only disclosure fairly chargeable to shareholders, consistent with the Section 16(a) mandate, is the disclosure of short-swing activity in Section 16(a) reports. *Whittaker*, 639 F.2d at 528 (citing Cook & Feldman, *supra*, 414). Section 16(a) reports operate like filed tariffs or lis pendens. Filing in a publicly accessible, single repository is deemed "notice to the world." *Adams v. Mills*, 286 U.S. 397 (1932) (tariff); *United States v. Real Prop. at 2659 Roundhill Dr.*, 283 F.3d 1146, 1155 (9th Cir. 2002) (lis pendens). Interested people know to check tariffs filed with governmental agencies. They know to check lis pendens filed with county auditors. Those interested in carrying out Congress' intent to patrol short-swing insider trading know to check Section 16(a) reports filed with the SEC. They should not have to research newspapers, magazines, or court dockets throughout the country to learn of a potential claim when federal law requires insiders to file Section 16(a) reports in a single, publicly accessible place. Were the law otherwise, insiders would have an incentive not to file Section 16(a) reports and would be rewarded for their noncompliance.

Underwriters call their no-tolling rule "straightforward," Pet. Br. 31, but it would be difficult for courts and litigants to apply. The no-tolling rule is keyed off insider trading dates. Without Section 16(a) reports, however, trading dates would be ascertainable only through depositions and document requests made after litigation commenced. Even then, the plaintiff would have to ensure trading records the insider provided during discovery were authentic, accurate, and reflective of every targeted transaction. This would be a difficult, time-consuming, and expensive discovery process in ordinary Section 16(b) cases—not to mention those cases involving "unorthodox" transactions, *Kern County*, 411 U.S. at 593 n.24, shares held in others' names, or group issues. In many cases, it would generate contested factual issues for trial. This cannot be the bright-line system Congress intended when it ***required*** insiders to report under Section 16(a).

4. Legal Tolling of Section 16(b) Is Not Based on "Background Rules" or the Discovery Rule.

Section 16 legal tolling is not "extra-textual" or based on "background rules." Pet. Br. 3, 15, 27. It is based on an insider's failure to comply with the "text" of a federal statute requiring insiders to disclose their securities transactions. Nor is legal tolling a "discovery rule." *Id.* 2, 15, 17-18. Tolling when an insider fails to file Section 16(a) reports is not based on a plaintiff's subsequent discovery of short-swing insider trading in violation of Section 16(b). It is not based on a plaintiff's conduct at all. It is based on whether (and when) the defendant complies with Section 16(a).

Section 16 contains no "discovery rule" that would render tolling (legal or equitable) "unnecessary," unlike the other time limits in the 1934 Act. *Lampf*, 501 U.S. at 363. For this reason, courts and commentators have rejected Underwriters' argument and concluded that *Lampf* does not prevent tolling the Section 16(b) limitations period when the insider has failed to comply with Section 16(a). Wang & Steinberg, *supra*, § 14:3; Marc Steinberg & Daryl 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) (same). Excluding the district court decision at bar, ten decisions post-*Lampf* have addressed whether Section 16(b) should be tolled when the targeted insider failed to file Section 16(a) reports. All ten toll the statute. *Litzler*, 362 F.3d at 207; *Capitol First*, 2006 WL 3827329 at *11; *Am. Online*, 2005 WL 3299828, at *4; *Am. Express*, 351 F. Supp. 2d at 1082-83; *Rosen*, 179 F. Supp. 2d at 335-39; *Morales*, 1998 WL 314734, at *2-3; *Segen*, 2005 WL 1320875, at *3-4; *Tyco Int'l*, 2005 WL 927014, at *3-4; *Tristar*, 867 F. Supp. 149, 154 n.4 (E.D.N.Y. 1994); *Kellett*, slip op. at 9 (JA 213-214). Two of these cases explicitly reject the same argument Underwriters make to this Court. *Kellett*, slip op. at 9 (JA 213-14); *Tristar*, 867 F. Supp. at 154 n.4. The Ninth Circuit did the same in *Whittaker*—ten years ***before*** *Lampf*. *See supra* at 31.

D. Underwriters' No-Tolling Rule Is Inconsistent With Congress' Intent Because It Rewards Insiders Who Intentionally Violate Section 16(a).

Congressional intent would be thwarted if insiders could escape liability by not reporting as Section 16(a) requires. *Whittaker*, 639 F.2d at 528. Underwriters' no-tolling rule would incentivize insiders not to file Section 16(a) disclosures:

> 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)). Section 16(b) would be nullified if insiders could conceal their short-swing transactions by not filing Section 16(a) reports and then waiting two years to avoid any possible disgorgement liability:

> "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 Cook & Feldman, *supra*, at 414) (footnote omitted); *see also Litzler*, 362 F.3d at 207; Steinberg & Landsdale, *supra*, at 59.

A no-tolling rule would effectively end Section 16(b) enforcement against the most devious Section 16 violators—those that conceal their inside, short-swing transactions by intentionally not filing required Section 16(a) reports until two years thereafter, or ever. Such a result would "make the law which was designed to prevent fraud the means by which it is made successful and secure." *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918); *see also Merck*, 130 S. Ct. at 1793 ("This Court long ago recognized that something different was needed . . . where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." (emphasis in original)).

E. Legal Tolling Does Not Risk "Indefinite Liability."

Legal tolling when insiders fail to file Section 16(a) reports helps "'insure the maintenance of fair and honest markets,'" *Kern County*, 411 U.S. at 591 (quoting 15 U.S.C. § 78b), because it allows Section 16(b) cases to proceed against the worst violators. It does not, as Underwriters assert, create a never ending threat of litigation. Pet. Br. 36-37. To end tolling, insiders need only fulfill their Section 16(a) obligation and file the disclosures. Such an approach "seems most in accord with the congressional intent underlying section 16." Wang & Steinberg, *supra*, § 14:3; *see also* Romeo & Dye, *supra*, § 5.04[2][c] (noting Section 16(a) reports can be filed any time).

Underwriters assert, on the one hand, that Plaintiff and other shareholders should be deemed to have known facts underlying this Section 16(b) claim based on information available in the public domain. Pet. Br. 3, 42. On the other hand, Underwriters claim they themselves had no notice of any obligation to file Section 16(a) reports.[12] *Id.* 35. They, in essence, argue they had no duty to comply with Section 16(a) because they are not statutory insiders. *Id.* 35-36. However, bootstrapping of a disputed core merits defense is inappropriate when analyzing the Section 16 tolling issue on a motion to dismiss. Pet. App. 65a (citing *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000)); *Am. Online*, 2005 WL 3299828, at *4; *Kellett*, slip op. at 9 (JA 214). On a motion to dismiss, Plaintiff's factual allegations supporting essential Section 16(b) elements such as group and insider status must be deemed true. *Id.*; *see also Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). As noted by the United States as Amicus Curiae, "Respondent's allegations . . . encompassed all of the facts necessary to establish petitioners' obligation to disclose the transactions under Section 16(a)." Br. for United States as Amicus Curiae 18; *see also* JA 61-63.

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[12] Underwriters persuaded the district court that they never would have known to file Section 16(a) reports given Plaintiff's "theory." However, the district court inaccurately summarized that "theory" as "allocating IPO shares to their best customers in return for more business could lead to Section 16(b) liability." Pet. App. 109a-110a. The instant, risk-free profits were allocated to Issuer decision-makers, not to the Issuer itself, in return for the decision-makers exerting their influence to direct future business of the Issuer to Underwriters. Simply put, Underwriters were using IPO allocations to bribe Issuer decision-makers.

The only issue relevant to Section 16 legal tolling, therefore, is whether Section 16(a) reports were filed.

Underwriters' position is at odds with the facts regardless. There can be no real debate that Underwriters had actual notice of their own conduct at the time it occurred. They knew they entered into kickback arrangements with select customers to share profits from short-swing trades in Issuer securities. They knew they engaged in this conduct to hide from regulators their beneficial ownership of shares traded for a profit in the IPO aftermarket. Underwriters therefore must have known their "good faith" underwriting exemption from Section 16(a)'s reporting requirement was in serious jeopardy, if not entirely lost. They also must have known their coordinated underpricing scheme might constitute "group" activity that could expose themselves and others group members, as statutory insiders, to Section 16(b) liability.

As Plaintiff's cases underscore, the ability to limit the duration of Section 16(b) liability exposure lies exclusively with the insider. Underwriters could have filed Section 16(a) reports and avoided any risk of so-called "indefinite liability" even if they disagreed that they were subject to Section 16. Filing Section 16(a) reports would not be "essentially admitting liability" as Underwriters claim. Pet. Br. 37. The reports could have been filed, without prejudice, reserving all rights Underwriters undoubtedly will claim in these cases. For example, filing a Section 16(a) report is not an admission of group membership. *Morales*, 249 F.3d at 129. Nor does it concede beneficial ownership. 17 C.F.R. § 240.16a-1(a)(4).

Finally, these cases do not involve the rare circumstances about which Second Circuit Judge Jacobs expressed concern: "a claim that affects long-settled transactions might hang forever over ***honest*** persons." *Litzler*, 362 F.3d at 208 n.5 (emphasis added). This position was neither the Second Circuit's holding nor dictum. It was a side-comment addressing what Judge Jacobs "would have preferred to say." *Id.* In any event, Underwriters' conduct was anything but "honest." They engaged in prohibited, bad-faith kickback schemes that unlawfully concealed their beneficial ownership in Issuer securities by conducting short-swing trades through customer accounts.[13]

Underwriters' level of culpability is irrelevant to Section 16(b) liability, in any event. "Section 16(b) . . . imposes a general rule of strict liability." *Gollust*, 501 U.S. at 117. Its terms apply "irrespective of any intention on the part of" the insider. 15 U.S.C. § 78p(b). Congress recognized that Section 16(b) "would ensnare potentially innocent victims." Wang & Steinberg, *supra*, § 14:6.3. It "weighed this possibility against the abuse of inside information and concluded that the latter was the more urgent concern." *Id.* As Thomas Corcoran testified:

> You have to have a general rule. In particular transactions it might work a hardship, but those transactions that are a hardship represent the sacrifice to the necessity of having a general rule.

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[13] Underwriters may have wanted to conceal their bad-faith conduct, but that is no reason to protect them from a self-imposed risk of "indefinite liability."

Banking & Currency Comm. Hearings, 73d Cong. 6558.

II. THE COURT SHOULD APPLY LEGAL, NOT EQUITABLE, TOLLING.

A. Legal Tolling: Requiring a Section 16(a) Report to End Tolling Is Most Consistent With Congressional Intent.

Tolling of Section 16(b)'s two-year time limit properly ends when the insider discloses Section 16(a) information in the statutorily-mandated Section 16(a) filing. Tolling until the insider complies with Section 16(a) is most consistent with the text, context, purpose, and legislative history of Section 16. It is consonant with both original and continuing congressional intent. It also is the only approach that recognizes the legal tolling principles underlying Section 16 tolling, because it fully respects the insider's burden to comply with his Section 16(a) disclosure requirement. *See supra* at 17-44.

Federal courts have overwhelmingly followed this approach since 1947. *See supra* at 23, 45. It constitutes the logical tolling end point when an insider has failed to file Section 16(a) reports. It makes no sense to toll the two-year period when the insider fails to comply with Section 16(a), but end tolling despite the insider's continued noncompliance. Finally, Section 16 tolling provides a "bright-line," easy-to-apply, "mechanical" rule—precisely how Congress envisioned Section 16's "crude rule of thumb" would operate. *See supra* at 41-43.

B. Equitable Tolling: Constructive Notice of "Facts Underlying the Claim" to End Tolling Rewards Noncompliance with Section 16(a) and Lacks "Mechanical" Application.

Underwriters contend equitable tolling should end when a reasonable shareholder knows, or has reason to know, "the facts underlying the claim" as set forth in the complaint, regardless of whether the complaint sufficiently alleges facts necessary to support a Section 16(b) claim. Pet. Br. 43. Congress, however, designed Section 16 such that "the facts underlying" a Section 16(b) claim ***are*** the facts required to be disclosed in Section 16(a) reports—specific trading details, such as dates, pricing, and profits. Underwriters have never disclosed ***these*** facts, and Plaintiff is unable to allege ***these*** facts without Section 16(a) reports. No shareholder could ascertain such private trading activity without public disclosure. Yet that did not prevent Underwriters from using their disclosure violation offensively as an alternative argument for dismissal. In the district court, they argued:

> Which purchase(s)? Which sale(s)? By whom? On what date(s)? Involving how many shares? At what price(s)? Plaintiff alleges no such facts.

Dist. Ct. ECF Dkt. 57 at 22 (citing *Twombly*, 550 U.S. at 556). In the Ninth Circuit, Underwriters again argued:

> On what dates? In what amount? Simmonds pleads no facts that answer these basic questions.

9th Cir. ECF Dkt. 7083378 at 54 (citing *Twombly*, 550 U.S. at 555).

The United States, as Amicus Curiae, sets forth a similar but more specific equitable tolling approach. The Government's position is that "Section 16(b)'s two-year limitations period should be equitably tolled until a reasonably diligent security holder would have discovered the ***transaction*** that is alleged to trigger a disgorgement obligation." Br. for United States as Amicus Curiae 20 (emphasis added). Consistent with ***legal*** tolling under *Whittaker*, the Government acknowledges that proper reporting of the "transaction" in a Section 16(a) report would preclude further tolling regardless of the plaintiff's level of knowledge of the transaction. *Id.* However, the Government contends that ***equitable*** tolling principles require that tolling end—even without a Section 16(a) disclosure—in the rare circumstance that "a reasonably diligent security holder would be aware of the relevant transaction." *Id.* 20, 31.

Both Underwriters' and the Government's equitable tolling approaches constitute a variant of the Second Circuit's approach in *Litzler*. In *Litzler*, the court held that tolling should continue "only until 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, however, underscored that notice means the particular plaintiff received actual "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 with approval two district court cases holding other SEC filings would not provide notice equivalent to Section 16(a) disclosure. *Id.* at 208 n.6 (citing *Morales*, 1998 WL 314734, at *3; *Rosen*, 179 F. Supp. 2d at 338-39).[14]

Litzler's actual notice approach creates a burden on shareholders that Congress did not envision. Congress was clear that insiders must report Section 16(a) information in Section 16(a) disclosures to allow shareholders to enforce Section 16(b). *Litzler*'s plaintiff-specific notice standard "could seriously compromise the effectiveness of Section 16(b)" because it "permits the statute of limitations to run without notification of the unreported transactions to the issuer's security holders, and therefore denies most such persons the ability to enforce Section 16(b)." Romeo & Dye, *supra*, § 9.03[3]. *Litzler*'s suggestion that tolling could end upon notice to the ***issuer***

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[14] The district court attempted to rely on, but misapplied, the *Litzler* actual notice standard. The standard is not, as Underwriters often quote, actual notice of "the facts giving rise to [the] complaints"—especially where, as here, the plaintiff has been denied access to Section 16(a) information. *See*, *e.g.*, Pet. Br. 3 (quoting Pet. App. 107a). It is actual notice of Section 16(a)-specific facts themselves. *Litzler*, 362 F.3d at 208. Citing ***no*** record evidence, Underwriters distort *Litzler* when stating they "would prevail here even under the *Litzler* approach." Pet. Br. 41 n.7. To this day, no such "notice tantamount to" a Section 16(a) report is available anywhere in the public domain.

"depending on the circumstances" would further erode Section 16(b) enforcement. Issuers are controlled by the very same persons Section 16(b) targets. "Leaving insiders to police themselves" by allowing them to end tolling while shareholders remain in the dark would be "contrary to § 16(b)'s private shareholder enforcement purpose." *Mendell v. Gollust*, 909 F.2d 724, 729 (2d Cir. 1990), *aff'd* 501 U.S. 115 (1991). It "can be expected to secure the same results as those obtained when a fox guards a chicken coop." *Id.*

Contrary to Congress' goal for Section 16, *Litzler* tolling also "creates uncertainty" because actual notice depends on plaintiffs having received information "tantamount to" a Section 16(a) report. Richard Slack & Etan Mark, *For Whom the Statute of Limitations Tolls*, 16 Bus. & Secs. Litigator 6 (June 2004). This fact-intensive determination would "undoubtedly" create "additional litigation." *Id.* The Second Circuit in *Litzler* itself remanded the case to the district court for further proceedings, including potentially "trial." 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 Second Circuit indicated that the district court (including, potentially, a jury) would have to evaluate the notice not only as to any "particulars recited" in it, but also the reliability of the "source" from which it came, to assess whether the letter was truly "tantamount to" an insider's Section 16(a) report. *Id.* at 208. Inquiring into such "uncertain determinations" of a plaintiff's knowledge was one of the many reasons why *Whittaker* chose the bright-line disclosure rule in the first place. *Whittaker*, 639 F.2d at 529.

The equitable tolling approaches advanced by Underwriters and the Government go beyond *Litzler* because both would apply a standard of ***constructive***, not actual, notice of Section 16(a) information.[15] The "uncertainty" in enforcing *Litzler*'s actual notice standard would only be exacerbated by a standard that ends tolling upon "constructive" notice of Section 16(a) information. Ending tolling based on a constructive notice rule would be inconsistent with Congress' goal of having "clear boundaries." The inquiry would not seek "objective facts." It would require courts to resolve disputes about what the notice was, where it was disseminated, who received it, when it was received, and whether it provides sufficient notice of relevant Section 16(a) facts. Such equitable tolling adjudications are "often fact-intensive," require "flexibility," and are designed precisely "for ***avoiding*** mechanical" application. *Holland v. Florida*, 130 S. Ct. 2549, 2563, 2565 (2010) (citations and quotations omitted) (remanding for "evidentiary hearing"). An

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[15] Underwriters relied on *Litzler* (not *Lampf*) at the district court and Ninth Circuit levels. They did not even cite *Lampf* once. Instead, they argued tolling ends upon ***actual*** notice pursuant to *Litzler*. The "actual notice" standard was a core part of their petition for certiorari to this Court. Underwriters now premise their notice argument on "constructive" rather than "actual" notice. Underwriters literally have removed the word "actual" from the "Question Presented" on which their petition for certiorari was based. Even then, Underwriters premise their constructive notice position on something other than notice akin to a Section 16(a) filing. Section 16(a)-equivalent information remains unknown and inaccessible to Plaintiff, her attorneys, and any other non-insider shareholder—actually or constructively.

added layer of process may be appropriate in certain contexts; however, Section 16 is not one of them. Congress designed Section 16's "crude rule of thumb" precisely for ***ensuring*** "mechanical" application. *See supra* at 41-43. Section 16 legal tolling serves this congressional goal. Equitable tolling does not.

No court has applied a constructive notice, end-of-tolling rule in the 77-year history of Section 16. Although called "equitable," such a tolling approach would reward noncompliance with Section 16(a). It would create a new judicially established burden of inquiry on shareholders despite that, under Section 16(a), Congress squarely placed a duty of affirmative disclosure on insiders.

III. THESE CASES ARE TIMELY UNDER LEGAL OR EQUITABLE TOLLING.

A. Legal Tolling

Underwriters have never filed Section 16(a) reports. Plaintiff's actions, therefore, are timely under the legal tolling interpretation reflected in *Whittaker* and the many cases that have followed it.

B. Equitable Tolling

These actions also would be timely under the equitable tolling theories described by Underwriters and the Government, in any event. Underwriters cite *Merck* for the view that "equity demands reasonable diligence, assessed by what a plaintiff knew or should have known." Pet. Br. 42 (citing *Merck*, 130 S. Ct. at 1793-94). However, the Court in *Merck* also was careful to point out that tolling ends only upon reasonable notice of the facts supporting each element of the claim. 130 S. Ct. at 1796 (tolling first prong of Section 10(b) time limit because plaintiff reasonably could not have discovered scienter). Tolling does not end upon mere "inquiry notice" or "storm warnings." *Id.* at 1797-98. It ends when a plaintiff should have reasonably discovered the facts essential to the claim. *Id.*

Insider status is an element of every Section 16(b) claim. Here, insider status is based on a group collectively owning more than 10 percent of the issuer's shares. Without Section 16(a) reports, circumstantial evidence of "group" facts was ascertainable only by a shareholder willing and able to undertake an intensive investigation, at best, in the period immediately—i.e., well within two years—before Plaintiff filed her complaints. *See supra* at 11-14. Further, Plaintiff's "[m]aximum feasible diligence" is not the standard for equitable tolling.[16] *Holland*, 130 S. Ct. at 2565 (concluding "diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence") (citations and quotations omitted).

Plaintiff's complaints are not, as Underwriters state, "based on the very same facts at issue in the high-profile IPO litigation." Pet. Br. 43. Although the IPO Litigation (and the SEC action against Credit Suisse) show Underwriters were beneficial owners of Issuer shares traded on the short-swing, neither source alleges (much less reveals) that Underwriters

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[16] Without Section 16(a) disclosures, even the most diligent shareholder would be limited to circumstantial evidence.

were Section 16 insiders. Neither source sets out evidence of the group conduct upon which Plaintiff's Section 16(b) cases are based: the underpricing-based combination among Underwriters and key Issuer decision-makers as a coordinated scheme to realize short-swing profits. *See supra* at 11-14; *see also* JA 61 (group allegations).

Underwriters point out that neither the IPO Litigation plaintiffs nor the SEC alleged a Section 16 violation. Pet. Br. 9. This is true; however, it only confirms Plaintiff's point. At the time of the IPO and SEC litigation, neither the SEC nor outside shareholders and their attorneys—including the "sophisticated" "specialized" Section 16(b) "plaintiffs' bar" (Br. for Chamber of Commerce, et al. as Amici Curiae 20-21)—were aware of facts establishing Underwriters as members of a group that collectively owned more than 10 percent of Issuers' shares. Had they been aware of group facts, at least one of the thousands of legal eyes focused on the "high-profile" IPO Litigation would have asserted Section 16(b) claims against Underwriters.

Essential insider-status group facts were not known then (at least to outsiders), and there is no evidence to the contrary. Underwriters cite none. The Government cites none. The district court had none. The record before this Court contains none. Plaintiff knows of none.

Nor could such facts reasonably have been known given Underwriters' violation of their statutory obligation to report short-swing, group trading under Section 16(a). *See Holland*, 130 S. Ct. at 2562 (noting reasonably diligent plaintiff entitled to equitable tolling when "some extraordinary circumstance stood in his way") (citation and quotation omitted). Even academic scholars, who have devoted much of their careers to studying the underpricing phenomenon, were unaware of data supporting group facts. These experts were unable to publish articles on this particular facet of underpricing until years ***after*** these cases were filed "***mainly due to the lack of data***." Lui & Ritter, *supra*, at 2025 (emphasis added).

IV. NONE OF THE 54 CASES IS "OVER" IF THIS COURT AFFIRMS.

Underwriters proclaim that 30 of the 54 cases "are now over," Pet. Br. 12 n.1, as if this Court's decision on timeliness grounds would have no bearing on the outcome of those cases. However, affirming the Ninth Circuit on the limitations issue permits all 54 cases to proceed.

The Ninth Circuit agreed with the district court that 30 of the 54 complaints should be dismissed on the separate ground that Plaintiff's pre-suit demands (a precondition to suit under Section 16(b)) were factually insufficient, and "directed" that the district court dismiss the remaining 24 complaints on the same basis. Pet. App. 66a-68a. The Ninth Circuit "converted" the 30 dismissals, which had been "without prejudice," to dismissals "with prejudice," relying on *In re Kauffman Mut. Fund Actions*, 479 F.2d 257 (1st Cir. 1973). Pet. App. 67a.

Far from rendering the cases "over," the Ninth Circuit summarized that the decision to dismiss on account of a precondition to suit, such as pre-suit demand, is only dismissed "with prejudice" on the merits of the very "issues decided" (in *Kauffman*, demand futility; here, demand sufficiency). *Id.* Dismissal is "without prejudice" as to all other demand issues, rendering them ripe for future adjudication. *Lucas v. Lewis*, No. 09-55857, 2011 WL 1453834, at *1 (9th Cir. Apr. 15, 2011) (citing Pet. App. 66a-67a; *In re Sonus Networks, Inc.*, 499 F.3d 47, 61-63 (1st Cir. 2007)).

The cases, therefore, are not "over" in the event the Court affirms the Ninth Circuit on the limitations issue. Plaintiff would be free to either serve substantively new demands with after-acquired information in any or all of the 54 cases, or file new complaints alleging demand futility. Litigating either a new demand or demand futility would not involve re-litigating any demand issue already decided. Such proceedings therefore would be fully consistent with the Ninth Circuit's disposition (and *Kauffman*, *Sonus Networks*, and *Lucas*), and fully inconsistent with Underwriters' assertion that the cases are "now over."

CONCLUSION

Respondent respectfully requests that this Court affirm the judgment of the Ninth Circuit regarding the timeliness of these actions and remand them for further proceedings consistent with Part IV *supra*.

Respectfully submitted,

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