No. 10-1261

In The Supreme Court of the United States

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

v.

VANESSA SIMMONDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

The Chamber of Commerce of the United States of America and Securities Industry and Financial Markets Association respectfully submit this brief as amici curiae in support of petitioners.[1]

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

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[1] Documents reflecting the parties' consent to the filing of this brief have been submitted to the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. SIFMA regularly files amicus curiae briefs in cases that raise legal issues of vital concern to the participants in the securities industry.

The Chamber, SIFMA, and their members recognize the importance of the federal securities laws to deter and remedy wrongdoing. But the Ninth Circuit's holding in this case effectively eliminates an otherwise valid defense in securities actions under Section 16(b) of the Securities Exchange Act of 1934. Amici and their members are concerned that the broad tolling rules articulated by the courts of appeals in cases involving purported non-compliance with the reporting requirements of Section 16(a) will undermine the repose that is one of the goals of our federal securities laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Section 16(b) of the Securities Exchange Act of 1934, Congress authorized civil actions by an issuer corporation or "by the owner of any security of the issuer in the name and in behalf of the issuer" to recover profits from certain covered purchases and sales of the corporation's securities within a six-month period. 15 U.S.C. § 78p(b). Congress also provided that "no such suit shall be brought more than two years after the date such profit was realized." *Ibid*.

The language of the statute is clear—nothing in the text indicates that the limitations period runs from anything other than the time of the violation, i.e., when the "profit was realized." When Congress wanted a limitations period to run from the "discovery" of a violation in the Securities Exchange Act, it said so expressly. The Ninth Circuit erred in ignoring that the plain language establishes a period of repose, as this Court observed in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

Instead, based on its own policy judgment, the court below (as have other lower courts) adopted its own tolling rule for the express cause of action in Section 16(b). But as interpreted by the court of appeals, the limitations period of Section 16(b) offers no repose at all. Indeed, respondent acknowledged below that the Ninth Circuit's rule allows a plaintiff with actual knowledge of a Section 16(b) violation to wait decades before filing suit, so long as the defendant has not filed a purportedly required report with the Securities and Exchange Commission (SEC) under Section 16(a). Nothing in the statute's text supports such a scheme, and Congress could not possibly have wanted it.

To the contrary, Congress deliberately designed the limitations periods of the Act to lessen the possibility of lingering litigation. Congress consistently used discovery rules to shorten limitations periods, not extend them. Congress did so to give potential defendants greater repose, even in situations, unlike here, where the alleged violation involves intentional, fraudulent, wrongdoing. If, as this Court observed in *Lampf*, Congress did not intend plaintiffs to be able to rely on tolling with regard to causes of action involving intentional misconduct, there is no reason to believe Congress would have wanted tolling for the cause of action in Section 16(b), which imposes strict liability.

The Ninth Circuit's misreading of the statute is particularly problematic because virtually all of the litigation under Section 16(b) is driven by attorneys' fees, not by harm to any plaintiff. Because any profits recovered in the litigation (minus attorneys' fees) go to the corporation itself, the named plaintiffs have almost no personal stake in the litigation. The fact that respondent is related to one of the lawyers and obtained the shares at his direction is also not uncommon in Section 16(b) litigation. In these circumstances, any form of tolling is particularly unwarranted.

Finally, even if a tolling rule were going to be grafted onto the plain language of the statute, respondent's suit is untimely under either the doctrine of "discovery accrual" or under "equitable tolling." Both are based on what a plaintiff knows or should have known after due diligence. Respondent cannot dispute that she should have known of the purported profit of which she now complains many years before she filed suit, and indeed many years before she obtained the securities. Indeed, she relies on the same facts that were alleged in a complaint filed six years before hers.

ARGUMENT

I. CONGRESS EXPRESSLY ENACTED A STRICT TWO-YEAR STATUTE OF REPOSE

The Ninth Circuit adopted a tolling rule for the express limitations period in Section 16(b) of the Securities Exchange Act of 1934 that is inconsistent with the text and purpose of Section 16 and the Act as a whole.

By its terms, the statute reflects that the two-year limitations period is an absolute outside limit on bringing suit. That conclusion is confirmed by its legislative backdrop. Thus, as this Court stated after an extensive survey of the 1934 Act, Section 16(b) was intended to establish a "period of repose" and, like the other limitations in the Act, it is not subject to any form of tolling. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 & n.5 (1991). At the very least, Congress did not intend courts to graft onto it the unprecedented tolling rule adopted by the Ninth Circuit, or any variant thereof.

A. Section 16(b)'s Text And Purpose Demonstrate That Congress Imposed A Strict Two-Year Statute Of Repose

1. The plain language of Section 16(b) shows Congress intended to prohibit suits brought outside the two-year period provided in the statute.

Section 16(b) provides that "any profits realized" by certain statutorily-defined covered persons from the purchase and sale, or sale and purchase, of any equity securities occurring within a six-month period would "inure to and be recoverable by" the issuer corporation. 15 U.S.C. § 78p(b). Congress authorized civil actions against those persons "instituted * * * by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit." *Ibid*. But in the same sentence, Congress provided that "no such suit shall be brought more than two years after the date such profit was realized." *Ibid*.

Congress readily could have adopted a different scheme. It could have made the limitations period commence on the date that the transaction was reported under the disclosure requirements of Section 16(a). Or Congress could have made the date run from when the company knew of or should have discovered the purchase or sale; or the date the company knew of or should have discovered the realized profit. Congress did not. Instead, Congress made clear that the limitations period runs from the time the violation was completed, i.e., "after the date such profit was realized." 15 U.S.C. § 78p(b). That should be the end of the matter.

Tying a limitations period to a wrongful act (as opposed to the plaintiff's injury) is typical when Congress intends the period to be one of repose, not subject to tolling. "A statute of repose differs from a statute of limitations in the former's legislatively specified time for commencement of the limitation period (frequently the time of the occurrence of the legal wrong)." 1 Calvin W. Corman, *Limitations of Actions* § 6.1, at 371 (1991).

Furthermore, Congress created the cause of action and the limitations period in the same sentence. That suggests Congress intended to treat the limitations period as an integral part of the cause of action itself, and not simply a limit on the remedy. That close textual link also shows that Congress did not intend the limitations period to be subject to tolling. *See Davis v. Mills*, 194 U.S. 451, 454 (1904) ("the fact that the limitation is contained in the same section" is "a ground for saying that the limitation goes to the right created").

2. Reading Section 16(b)'s plain language as a statute of repose is consistent not only with fundamental rules of statutory construction applicable to all statutes, but also makes sense given the nature of Section 16(b).

Section 16(b) is a prophylactic rule. Section 16(b)'s rule about when profits inure to a corporation is both over- and under-inclusive in its effort to target trading on insider information. For example, Section 16(b) does not require proof of possession of any insider information. But it also does not apply to transactions outside the six-month period, even if a defendant did use insider information. This Court thus has recognized that Section 16(b) establishes a "'crude rule of thumb'" that serves as a "prophylactic rule with respect to insider, short-swing trading." *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 & n.26 (1976) (quoting *Stock Exchange Practices: Hearings Before the Senate Comm. on Banking & Currency*, 73d Cong. 6556-6557 (1934) (testimony of Thomas G. Corcoran)).

Section 16(b) also imposes "a general rule of strict liability." *Gollust v. Mendell*, 501 U.S. 115, 116-117 (1991); *see also Foremost-McKesson*, 423 U.S. at 251 ("this statute imposes liability without fault within its narrowly drawn limits"). It deprives the covered person of his short-swing profits, regardless of his intent or actual possession of inside information. *See Kern Cnty. Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 592-593 & n.23 (1973).

Thus, to the extent there is ambiguity, it is "inappropriate to reach the harsh result of imposing § 16(b)'s liability without fault." *Foremost-McKesson*, 423 U.S. at 252.

Furthermore, Congress's treatment of defendants accused of intentional misconduct in the Securities Exchange Act provides a useful indication of how Congress intended to treat those accused of this strict liability provision. In *Lampf*, this Court held that Congress intended to enact statutes of repose (i.e., limitations periods not subject to equitable tolling) for the Act's other express causes of action in Sections 9 and 18. 501 U.S. at 361-362. Those sections deal with intentional, often fraudulent, wrongdoing. There is nothing to suggest (much less show) that Congress intended to deny such repose to defendants who may have breached a strict liability provision.

Where, as here, the text and purpose demonstrate that Congress did not intend a particular time limit to be extended, this Court cannot give such extensions through application of background rules. *See* Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity*, § 274, at 588 (1882) ("when the courts engraft upon these statutes [of limitations] exceptions which the statute does not make or warrant, its action is nothing more nor less than an assumption of legislative functions"). Indeed, *Lampf* squarely rejected the suggestion that the outer limit of the limitations periods of the Securities Exchange Act was subject to equitable tolling for precisely this reason. *See* 501 U.S. at 363.

B. Other Limitations Periods In The Securities Exchange Act, As Well As The Act's Legislative Backdrop, Confirm That Congress Provided A Strict Statute Of Repose For Section 16(b)

1. This plain language reading of Section 16(b) is bolstered by the text and history of the limitations provisions for the other express causes of action in the same Act. *See Lampf*, 501 U.S. at 359. The Securities Exchange Act contained three express causes of action with limitations periods: the provisions that are now Sections 9(f), 16(b), and 18(c). Ch. 404, tit. I, §§ 9(e), 16(b), 18(c), 48 Stat. 881, 890-891, 896, 898 (codified as amended at 15 U.S.C. §§ 78i(f), 78p(b), 78r(c)). The Act also shortened the limitations period in Section 13 of the Securities Act of 1933 for the express causes of action created by that statute. *See id*. tit. II, § 207, 48 Stat. 908 (codified as amended at 15 U.S.C. § 77m).

These provisions demonstrate that when Congress intended a limitations period to run from the discovery of a violation, it said so. Sections 9 and 18 of the Securities Exchange Act both expressly identify the role discovery is to play in determining the limitations period. For example, Section 9(f) provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. § 78i(f); *see also* 15 U.S.C. § 78r(c) (Section 18(c)). Notably, in direct contrast to the ruling below, Congress used the discovery rules in each provision to *shorten*, not extend, the limitations period. Furthermore, in each provision, Congress established an outside time period that could not be breached, even absent discovery. *See Lampf*, 501 U.S. at 362. In light of these reticulated limitations periods, a discovery rule should not be grafted onto Section 16(b)'s plain language. Nor should it be read, as respondent would do, to have no outside time limit.

2. The legislative debates surrounding these limitations periods confirm that Congress deliberately decided not to toll the limitations periods indefinitely until discovery. To be sure, the debates did not address the particular time limitation in Section 16(b), which was not added until very late in the legislative process. But the debates reflect Congress's understanding that absent an express provision regarding discovery or tolling, the time limitations prescribed in the Act were absolute.

a. The drafting history shows that Congress rejected efforts to tie the running of the limitations periods exclusively to discovery of the violation. An early proposal would have provided that, for violations of Sections 9 and 18, no action could be brought except "within two years after *the discovery* of the violation upon which it is based." *Stock Exchange Practices: Hearings Before the Senate Comm. on Banking & Currency*, 73d Cong. 6427, 6431 (1934) (emphasis added). Senator Kean objected that "[t]wo years after [the violation] would be all right, but 2 years after discovery means nothing but blackmail." *Id*. at 6565. The Senator was concerned that plaintiffs would start searching for the violations only after the value of the stock had decreased "and years afterwards there is a liability that carries to your grandchildren and great-grandchildren." *Ibid*.

Ultimately, the Senate Committee reported out a bill that extended the outer time limit to six years after the violation, but also imposed an additional inner-limit by requiring filing the action within two years of discovery of the facts constituting the violation. S. Rep. No. 73-792, at 18, 21 (1934). This approach was ultimately accepted by the Senate after a debate that addressed two points.

First, the Senators who spoke all agreed that, as the text itself provided, the proposed six-year outside limit was absolute. *See* 78 Cong. Rec. 8198 (1934) (Sen. King) ("Suppose a person against whom a fraud was committed did not discover it until 6 years and 1 day; then no action would lie."); *ibid*. (Sen. Barkley) ("If a man makes no discovery of fraud within the time limit of the statute then he cannot sue at all."); *id*. at 8200 (Sen. Barkley) ("the [6]-year limitation fixes the ultimate period of limitation when he can bring suit"). Thus, absent an express reference to the discovery rule, it was understood that the limitations period would necessarily run from the violation. *Id*. at 8199 (Sen. Barkley). ("If we should strike out [reference to the discovery of the violation] we would have a straight period of 6 years in which anybody damaged could bring suit.").

Second, Senators explained the benefit of short, fixed limitations periods. They were concerned that long statutes of limitations "would deter men from serving on boards of directors, because the man might die and his estate would be liable, possibly 8 years after his death." *Id*. at 8200 (Sen. Byrnes); *see also id*. at 10,186 (Sen. Byrnes) (referring to concern that an estate might not be settled for several years if the decedent had been a director absent a short limitations period); *id*. at 8198 (Sen. Fletcher) ("[T]he person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed."). Thus, the Senate shortened the time periods proposed by the committee by one year and reduced the time periods already in the 1933 Act by several years. *Id*. at 8201-8202.

b. The Conference Committee (and then both houses of Congress) combined the most restrictive elements of each body's limitations provisions for Sections 9 and 18.

The Conference Committee reduced the outer time limit to three years from the violation, as provided in the House bill, rather than the longer period adopted by the Senate. *See* H.R. Rep. No. 73-1838, at 32, 36 (1934) (Conf. Rep.). But it also kept the Senate's requirement that, in addition, a plaintiff had to file the suit within one year of discovering the violation. *Ibid*.

With regard to Section 16, the Conference Committee accepted the Section 16(b) cause of action (which had been adopted by the Senate but not the House). *Id*. at 36. But it added a two-year limitations period running from "the date the profit was realized."

This drafting history shows that when Congress wanted the discovery of a violation to trigger a limitations period, it said so explicitly. And when it employed such discovery rules, they shortened the period of time to bring suit rather than extended it. Moreover, as the legislation evolved, Congress repeatedly reduced the time periods themselves to give potential defendants greater repose. Indeed, in each instance where Congress made changes to the Act, "the period finally selected [by Congress] attaches more significance to a policy of repose than to protecting investors" from undiscovered violations. Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims*, 60 U. Colo. L. Rev. 235, 262 (1989); *see also* 78 Cong. Rec. 10,186 (1934) (Sen. Byrnes) ("[T]he amendments adopted today give greater assurance to the honest officials of a corporation."). This Court should not read in tolling rules that Congress did not adopt.

3. Congress's intent was confirmed when, after *Lampf*, it addressed the limitations period for the implied causes of action in the Securities Exchange Act. As this Court recounted in *Merck & Co. v. Reynolds*, in enacting an express limitations period for Section 10(b), Congress "repeated *Lampf*'s critical language" in the Sarbanes-Oxley Act, except to extend the outside period of repose from three years to five years.

130 S. Ct. 1784, 1795 (2010) (citing Pub. L. No. 107-204, 116 Stat. 745, 801 (2002) (codified at 28 U.S.C. § 1658(b)).

When Congress was thus revisiting the Act's limitations periods, it could have altered the limitations period in Section 16(b) to overcome this Court's description of it as a repose provision. It did not. Instead, it retained and built on the statutes of repose this Court recognized in *Lampf*.

II. EVEN IF CONGRESS HAD NOT PRECLUDED ANY EXTENSIONS, NO TOLLING WOULD BE WARRANTED IN THIS CASE

Even if some tolling rule were appropriate for Section 16(b) actions, the Ninth Circuit adopted a rule that is inconsistent with traditional tolling rules and should be rejected. Its rule would burden amici's members, by forcing them to choose between making disclosures they do not in good faith believe are appropriate or being indefinitely subject to Section 16(b) claims with no limitations period.

A. The Ninth Circuit's Tolling Rule Is Based On An Erroneous Understanding Of The Relationship Between Section 16(a) And Section 16(b)

1. In *Whittaker v. Whittaker Corp.*, the Ninth Circuit adopted a tolling rule that tied the limitations period of Section 16(b) to filing of a disclosure form pursuant to Section 16(a). 639 F.2d 516 (9th Cir.), cert. denied, 454 U.S. 1031 (1981). Section 16(a) requires certain covered persons initially to report to

the SEC "the amount of all equity securities of such issuer" of which they are the beneficial owner and then promptly to report "any such changes in such ownership." 15 U.S.C. § 78p(a)(1), (a)(3).

In linking the limitations period of Section 16(b) to compliance with Section 16(a), the Ninth Circuit has allowed Section 16(b)'s limitations period to be extended indefinitely, regardless of when the profit was realized or when a plaintiff should have known of the profit. According to the Ninth Circuit, the two-year time limit for bringing a Section 16(b) action "begins to run" only when the defendant discloses the relevant purchases or sales of securities in a filing with the SEC under Section 16(a). *Whittaker*, 639 F.2d at 527-530.

As respondent acknowledged (Pet. App. 110a), the result of the court of appeals' approach is that petitioners will never be able to invoke the limitations defense unless (1) they can prevail on the merits of their claim that they are not covered persons who are subject to Section 16(a), in which case the limitations issue becomes pointless; or (2) they file reports with the SEC that they do not believe they are required to file. Neither option is sensible or within the equitable traditions underlying tolling.

The Second Circuit has adopted an only-slightly-less-expansive approach. *See Litzler v. CC Invs., L.D.C.*, 362 F.3d 203 (2d Cir. 2004). Under its approach, "tolling is triggered by noncompliance with the disclosure requirements of Section 16(a)," but such tolling continues 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." *Id.* at 208. For the reasons below, both the Ninth and Second Circuit's approaches should be rejected.

2. Sections 16(a) and 16(b) each have distinct domains. One is a disclosure provision regarding all changes in ownership and one is a provision regulating the profits from short-swing trades. They can each co-exist apart from the other. The disclosures required by Section 16(a) are neither necessary nor sufficient to determine whether a covered person's profits should inure to the corporation under Section 16(b). "[M]any reports are required by section 16(a) of transactions which are not subject to section 16(b) liability." SEC Release No. 34-4801 (Feb. 20, 1953), reprinted in 18 Fed. Reg. 1131, 1131 (Feb. 27, 1953). Thus, the provisions' own terms provide no basis for holding, as the court of appeals did, that the time to file an action under Section 16(b) should be automatically tolled by the absence of a report under Section 16(a).

Even when a Section 16(a) report involves a transaction relevant to Section 16(b), nothing in Section 16(a) requires a covered person to report "profits realized," which is the trigger for the Section 16(b) limitations period. Indeed, Section 16(a) itself contains no requirement that the report submitted by the covered person address the price of the securities purchased or sold. It requires certain covered persons to report only "changes" in their ownership of equity securities. Although the current "Form 4" promulgated by the SEC requires listing the "price" of the securities (Br. in Opp. App. A, at 1b), that is simply an administrative happenstance that could change at any time.

Nor does the filing of the Section 16(a) report provide an exclusive source of evidence that establishes a violation. A defendant sued under Section 16(b) is not bound by the statements made in his Section 16(a) reports. *See Morales v. Quintel Entm't, Inc.,* 249 F.3d 115, 129 (2d Cir. 2001); *Chemical Fund v. Xerox Corp.*, 377 F.2d 107, 112 (2d Cir. 1967); Peter J. Romeo & Alan L. Dye, *The Section 16 Deskbook* § III.G.3, at 511 (Spring 2011). Likewise, as in this case, a plaintiff may learn all of the facts relating to a purported violation without any Section 16(a) report being filed. Thus, as a practical matter, there is no reason that the Section 16(b) cause of action should be contingent on the filing of a Section 16(a) report.

3. Nor would it be appropriate to toll Section 16(b) actions to encourage compliance with Section 16(a). Congress vested the federal government with exclusive authority to enforce Section 16(a). *See Scientex Corp. v. Kay*, 689 F.2d 879 (9th Cir. 1982) (no private right of action to enforce Section 16(a)).

Congress provided several express mechanisms for the SEC to assure compliance with Section 16(a).

The SEC can, and does, institute injunctive proceedings in federal district court to compel covered persons to file Section 16(a) reports. *See* Romeo & Dye, *supra*, § II.C.1.a(2), at 19-20 (collecting examples); Donald C. Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 407 (1953) (article authored by Chair of SEC and its Special Counsel noting instances where such actions had been brought). The SEC also can, and does, initiate disciplinary proceedings against securities professionals (i.e. brokers, attorneys and accountants who appear before the SEC) for their failure to comply with Section 16(a). *See* Romeo & Dye, *supra*, § II.C.1.b(2), at 26-27 (collecting examples).

In recent years (since obtaining the authority in 1990), the SEC has used cease-and-desist orders and substantial monetary penalties through administrative proceedings to compel compliance with Section 16(a). *See id.* § II.C.1.a(1)(B), at 16-17; *id.* § II.C.1.a(3)(A), at 21-23 (collecting examples). A willful violation of Section 16(a) can result in substantial criminal fines or imprisonment. *Id.* § II.C.1.c, at 28 (collecting examples but noting that criminal proceedings are "extremely rare").

B. The Existing Incentives For Attorneys To Locate Potential Violations Of Section 16(b) And Initiate Lawsuits Eliminate The Need For Any Extraordinary Tolling Rules

In addressing the appropriateness of tolling the limitations period for the Section 16(b) cause of action, the Court should not disregard the reality that lawsuits under Section 16(b) are driven primarily by attorneys' fees. This is because any profits recovered in a suit go to the corporation, not the named plaintiff. Thus, more than in other situations, the named plaintiff actually has no (or virtually no) economic interest in pursuing the lawsuit.

The primary economic incentive for locating potential violations and bringing suit is the implied non-statutory right to obtain attorneys' fees. That incentive has been particularly successful in generating Section 16(b) litigation. "[A]wards of generous attorneys' fees in these cases assure that every conceivable section 16(b) violation, no matter how remote or farfetched, will be litigated." Robert W. Hamilton, *Convertible Securities and Section 16(b)*, 44 Tex. L. Rev. 1447, 1450 (1965-1966) (footnote omitted).

Today, the small group of attorneys bringing Section 16(b) actions have sophisticated methods of locating purported violations, targeting different types of defendants, and avoiding conflicting claims amongst themselves. *See* Romeo & Dye, *supra*, § III.C.3, at 412-414 (describing various groups of lawyers).

Even in earlier times, attorneys drove these actions, rather than any individual who had been harmed. Isadore Blau, the plaintiff in *Blau v. Lehman*, 368 U.S. 403 (1962), and dozens of other 16(b) cases, was the owner of a newsstand in the lobby of his attorney's building. *See* Michael H. Dessent, *Weapons to Fight Insider Trading in the 21st Century*, 33 Akron L. Rev. 481, 491 n.46 (1999-2000); Edward Lamb, *No Lamb for Slaughter* 229 (1963); *see also* S.S. Samuelson, *The Prevention of Insider Trading*, 25 Harv. J. on Legis. 511, 522 n.55 (1988) (collecting some of the cases filed on behalf of Mr. Blau).

Similarly, the fact that respondent in this case is the daughter of one of the lawyers and obtained the shares at his direction (Pet. App. 107a-108a) is not uncommon in Section 16(b) litigation. *See* Dessent, *supra*, at 502 ("it has become a widespread practice of attorneys * * * to ask friends or family to purchase securities of the corporation in order to obtain standing and have the attorney provide their legal services").

While such conduct may not be improper, it does show that this specialized plaintiffs' bar has all the incentives and resources needed to detect and pursue legitimate claims under Section 16(b). The traditional rules governing tolling need not be distorted in order to provide further support for these actions.

C. Respondent's Claim Would Not Be Tolled Under Traditional Tolling Rules

As petitioners explain (Pet. Br. 27-29), this Court has recognized only two forms of tolling that might possibly apply in this situation. Neither, however, would assist respondent in avoiding the two-year limitations period because, even if applicable, both bar a claim once a plaintiff knew or should have known of the violation. And respondent cannot dispute that she should have known of the purported Section 16(b) violation several years before she filed her complaint.

First, the "discovery accrual" doctrine provides that a claim does not accrue "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part." *Merck*, 130 S. Ct. at 1794 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). Even assuming Section 16(b) is analogous to a fraud claim, which is doubtful, that tolling doctrine would not benefit respondent. For more than a century, "courts have understood that 'fraud is deemed to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered.'" *Ibid*. (citation omitted). And discovery is not limited to the particular plaintiff's actual discovery, "but also to the facts that a reasonably diligent plaintiff would have discovered." *Id.* at 1793. Failure to engage in reasonable diligence to discover the violation results in forfeiture of the discovery rule's benefits. *Cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194 (1997) (concluding for civil

RICO statute of limitations that "'reasonable diligence' does matter, and a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment'").

Second, the doctrine of "equitable tolling" permits a statute of limitations to be tolled "only if [the plaintiff] shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). Such diligence is likewise assessed by what a plaintiff knew or should have known based on reasonable diligence. *See, e.g., Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.); *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451 (7th Cir. 1990) (Posner, J.), cert. denied, 501 U.S. 1261 (1991); *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 930-931 (5th Cir. 1975) (Wisdom, J.).[2]

Respondent should have known of the purported profit many years before she filed suit, and indeed many years before she obtained the securities. Indeed, she relies on the same facts that were alleged in a complaint filed six years before hers. Pet. App. 85a. Her complaint is thus barred under either of these tolling doctrines.

[2] The Second Circuit's special tolling rule for Section 16(b)—which holds that tolling abates only when actual notice is established, *see Litzler*, 362 F.3d at 208—is contrary to the settled rule and should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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