No. 10-1261

IN THE
Supreme Court of the United States

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

v.

VANESSA SIMMONDS,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The brief in opposition only confirms that this Court's review is warranted. Respondent does not, and cannot, deny that the Second and Ninth Circuits have adopted "differen[t]" legal rules for determining when tolling ends under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). Opp. 19, 22 (citing *Litzler v. CC Invs. L.D.C.*, 362 F.3d 203 (2d Cir. 2004), and *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981)). Similarly, respondent does not, and cannot, deny that this Court has characterized the two-year time limit for bringing an action under Section 16(b) as a "statute of repose" not subject to tolling at all. Opp. 23 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)). And respondent does not, and cannot, deny that whether Section 16(b) is subject to tolling at all, and if so, when such tolling ends, are important and recurring issues of federal law. Opp. 14-15 (citing cases). Indeed, the author of the opinion below specially concurred to highlight the need for clarification of these issues. *See* Pet. App. 72-75a (M. Smith, J., specially concurring). While respondent obviously disagrees with petitioners on the merits, that disagreement provides no basis for this Court to deny review.

ARGUMENT

A. The Conflict Among The Circuits

Although it is undisputed that the Second and Ninth Circuits have adopted "differen[t]" Section 16(b) tolling rules, Opp. 19, 22, respondent nonetheless urges this Court to deny review on the ground that the difference is "not material to this litigation," *id.* at 19. According to respondent, the

two-year time limit for bringing a Section 16(b) claim would be tolled for her claims even under the Second Circuit's approach. *See id.* at 20-22. In particular, she argues that the Second Circuit's "actual notice" standard can be satisfied only when "*the plaintiff* gets actual notice of Section 16(a) information, including the 'specific short-swing profits' *trading details*." Opp. 20 (quoting *Litzler*, 362 F.3d at 208) (emphasis added). Respondent is wrong for two reasons.

First, respondent mischaracterizes the Second Circuit's holding in *Litzler*. The court did not hold that Section 16(b) tolling ends only when "the *plaintiff*" has actual notice of a claim. Opp. 20 (emphasis added). To the contrary, the Second Circuit recognized that Section 16(b) tolling also ends when the *issuing corporation* has actual notice of a claim. *See* 362 F.3d at 208. Indeed, the Second Circuit remanded in *Litzler* for the district court to assess the *corporation's* knowledge, not the *plaintiff's* knowledge. *See id.* That approach makes sense: a Section 16(b) shareholder plaintiff, after all, brings a claim on "behalf of the issuer." 15 U.S.C. § 78p(b).

Respondent thus misses the point by arguing that *she personally* did not have actual notice of anything, because her father bought her shares in the respondent issuers shortly before filing this lawsuit. *See* Opp. 22; *see also* Pet. App. 107-08a. As the district court recognized, the "actual notice" standard would be meaningless if a Section 16(b) attorney could avoid a time bar by simply "go[ing] out and find[ing] a plaintiff that was not on notice." Pet. App. 110 n.15. This case proves the point, because (as the cover of the brief in opposition confirms)

respondent's attorney is also her father. Nothing in *Litzler* supports this absurd and self-defeating result.

Second, respondent incorrectly claims that *Litzler* holds that Section 16(b) tolling ends only when the issuing corporation has actual notice of the specific "trading details" disclosed in a Form 4 filed under Section 16(a). Opp. 20. To the contrary, *Litzler* holds that notice "tantamount to a Form 4" would suffice, and remanded for a determination of whether a shareholder letter demanding that the corporation bring a Section 16(b) action provided such notice. 362 F.3d at 208. As respondent herself emphasizes, such a determination requires a careful factual inquiry by the district court. *See* Opp. 21 n.10 (citing *Litzler*, 362 F.3d at 208).

Curiously, however, respondent then turns around and argues that petitioners here cannot satisfy the *Litzler* "actual notice" standard *as a matter of law*. *See* Opp. 21 & nn. 9, 10. According to respondent, "actual notice" under *Litzler* means "the specifics of the short-swing trading details," *id.* at 21 n.9, and petitioners "cite no evidence in the district court or Ninth Circuit record" that meets this standard, *id.* at 21.

But *Litzler* does not require knowledge of the "specifics" or "details" of a Form 4, as long as the issuing corporation "had *sufficient notice* (*i.e.*, notice tantamount to a Form 4) that Defendants had realized specific short-swing profits that were worth bothering to recapture" through a Section 16(b) action. 362 F.3d at 208 (emphasis added); *see also id.* ("[T]olling would of course end on the date that [the issuing corporation] received *sufficient notice of a possible claim* under Section 16(b).") (emphasis

added). *Litzler* does not purport to enumerate the specific information necessary to provide such notice.

Here, the district court conducted the careful factual inquiry that respondent demands, *see* Opp. 21 n.10, and concluded that "all of the facts" sufficient to bring these Section 16(b) cases were known to the issuing corporations and their shareholders at least five years before respondent filed her complaints, Pet. App. 107a. In particular, the allegations are drawn almost verbatim from the allegations made against petitioners and the issuing corporations in the *IPO* litigation brought in 2001. *See* Pet. App. 83a, *see also* Pet. App. 85a ("[Respondent] filed her complaints for short-swing transactions based on the same set of facts as presented in *In re IPO*, albeit under a new theory of liability and almost six years later.").[1] Respondent

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[1] The brief in opposition confirms that this litigation is based on the very same alleged "underpricing and laddering schemes," Opp. 9, at issue in the *IPO* litigation. Indeed, in explaining the factual basis for her complaints, respondent block-quotes an SEC complaint against an underwriter that allegedly "wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock." Opp. 8. Respondent tellingly omits the date of that complaint, which was filed in *January 2002*, more than five years before respondent filed her complaints, *see* *http://www.sec.gov/litigation/complaints/complr17327.htm* (last visited June 6, 2011), and indeed was an exhibit in the *IPO* litigation. That complaint is rife with allegations of "profit-sharing arrangements," in which the underwriter allegedly received a portion of the profits that its customers made on transactions in the issuers' stock, which is precisely what respondent alleges in her complaints yielded "insider" short-swing profits subject to Section 16(b). Opp. 8.

identified no new facts, unknown to the issuing corporations, that came to light between the *IPO* litigation and the filing of her complaints. Rather, as the district court noted, "the only significant development … was [respondent's] acquisition of the shares in these companies." App. 108a.

Thus, contrary to respondent's argument, this case provides an ideal vehicle to resolve the conflict between the Second and Ninth Circuits, because the district court here *has already determined* that the facts sufficient to bring these Section 16(b) claims were known "over five years before these complaints were filed." Pet. App. 108a. Accordingly, petitioners would prevail under the Second Circuit's *Litzler* standard, *see* Pet. App. 107-08a, whereas the Ninth Circuit rejected their timeliness objection as a matter of law on the untenable ground that tolling continues even "*after* the corporation [is] on notice of the insider's trading," Pet. App. 63a (emphasis added; citing *Whittaker*, 639 F.2d at 530).

B. The Conflict With This Court's Precedent

Although it is undisputed that this Court has characterized the two-year time limit for bringing an action under Section 16(b) as a "statute of repose" not subject to tolling, *see Lampf*, 501 U.S. at 360 n.5; *see also id.* at 375 (Kennedy, J., dissenting), respondent dismisses that characterization as mere "dictum" of "no value to the Court's analysis." Opp. 23 & n.11. Indeed, respondent urges this Court to deny review here precisely because the lower courts have been "substantially uniform" in allowing tolling under Section 16(b) notwithstanding this Court's precedent. Opp. 15.

These arguments highlight the need for this Court's review. Contrary to respondent's assertion, this Court's characterization of the two-year time limit in Section 16(b) as a statute of repose was not careless "dictum," Opp. 23 & n.11, but an integral part of the Court's analysis of how the various time limits in the federal securities laws relate to each other and work together as a coherent whole. In particular, this Court characterized the two-year time limit in Section 16(b) as a statute of repose in the context of holding that the judicially-created cause of action under Section 10(b), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, like other provisions of the federal securities laws, is also subject to a period of repose. *See Lampf*, 501 U.S. at 359-60.

Respondent insists, however, that Section 16(b) is "unique" and contains "language that materially differs" from the language of other provisions of the federal securities laws. Opp. 24. In particular, respondent notes that the provisions addressed by this Court in *Lampf* and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), have a dual structure, with both a discovery rule and a statute of repose. *See* Opp. 24. According to respondent, the absence of a discovery rule in Section 16(b) warrants ignoring this Court's characterization of that time limit as a statute of repose. *See id.*

Respondent completely misreads *Lampf* and *Merck*. This Court emphasized in *Lampf* that Section 16(b) was "*more* restrictive," not *less* restrictive, than the provisions of the securities laws with a dual structure. 501 U.S. at 360 (emphasis

added). The discovery rule in those other provisions does not *extend* the statutory time period for filing a suit, but rather *limits* it: once a plaintiff discovers the facts constituting a violation, she must sue within a specified period of time, even *within* the statutory period of repose. "The discovery provisions [in the federal securities laws], unlike the tolling concept, are not designed to determine when the statute commences to run, but to the contrary resulted from a consensus that one should not have the full statutory period to initiate an action once they have discovered the alleged fraud." Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (Mar. 1985). Because Section 16(b) established a shorter time period for bringing suit than these other provisions, there was no need for a discovery rule in Section 16(b) to shorten that period even further.

Respondent fares no better when she tries to justify Section 16(b) tolling on textual grounds. As respondent notes, that provision states that "no such suit"—*i.e.*, a suit to recover the short-swing profit prohibited by Section 16(b)—"shall be brought more than two years after the date such profit"—*i.e.*, the short-swing profit prohibited by Section 16(b)—"was realized." 15 U.S.C. § 78p(b). But that is exactly petitioners' point: under the statute's plain terms, the two-year period begins to run on "the date such profit was realized," *not* on the date the alleged insider files a Form 4 under Section 16(a), as the Ninth Circuit holds, *see* Pet. App. 61-66a; *Whittaker*, 639 F.2d at 527-30, nor even on the date the issuing corporation receives sufficient notice to bring a Section 16(b) lawsuit, as the Second Circuit holds, *see Litzler*, 362 F.3d at 208. If respondent really

wants "a clear rule for district courts to carry out before expensive and time-intensive litigation on the merits," Opp. 20 n.8, this is it: a Section 16(b) claim challenging a short-swing profit is untimely if "brought more than two years after the date such profit was realized," 15 U.S.C. § 78p(b), period.

Respondent tries to avoid that straightforward point by observing that "such profit" in Section 16(b) refers to the profit obtained by "such beneficial owner, director, or officer" as defined by Section 16(a). *See* Opp. 25-26. But that observation proves nothing; it simply leads to the unremarkable conclusion that "Sections 16(a) and (b) must be read together." Opp. 25 (emphasis omitted). In no way does that observation call into question this Court's characterization of the two-year time limit in Section 16(b) as a statute of repose. *See Lampf*, 501 U.S. at 360 n.5.

Respondent's prediction that the absence of tolling under Section 16(b) will undermine the disclosure requirements of Section 16(a) and lead to unchecked short-swing profiteering by insiders, *see* Opp. 26-27, is similarly unfounded. As Judge Smith noted in his special concurrence, "[t]he Exchange Act creates more than adequate enforcement mechanisms for enforcing Section 16(a)'s disclosure requirements." Pet. App. 74a. "If the insiders do not file their reports, they may be held professionally, civilly, or criminally liable." *Id.* "And if the insiders withhold their Section 16(a) reports in order to profit from inside information, they may be subjected to Rule 10b-5 securities fraud actions." *Id.* at 75a. What respondent is really seeking here, as Judge Smith pointed out, is "the creation of never-ending

liability for corporate directors, officers, and shareholders." *Id.* at 74a. Nothing in Section 16(b) either compels or tolerates that result.

Finally, respondent argues that this Court's review is unwarranted because "the substantially uniform holdings" of the lower courts allow tolling under Section 16(b), Opp. 14-15, notwithstanding this Court's decisions. Once again, that argument only underscores the need for this Court's review. This Court should not allow the lower courts to ignore its precedents and effectively establish a *de facto* nationwide tolling rule under Section 16(b), much less a *de facto* nationwide tolling rule subject to different legal rules in different circuits.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

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Respectfully submitted,

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