No.

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

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER B. WELLS
RYAN P. MCBRIDE
LANE POWELL PC
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101
Liaison Counsel for Petitioners

CHRISTOPHER LANDAU, P.C.
Counsel of Record
ANDREW B. CLUBOK
BRANT W. BISHOP, P.C.
SUSAN E. ENGEL
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com
Counsel for Petitioner Morgan Stanley & Co. Inc.

[Additional Counsel Listed on Signature Page]

April 15, 2011

QUESTION PRESENTED

Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and, if so, whether tolling continues even after the receipt of actual notice of the facts giving rise to the claim.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Citigroup Global Markets Inc. is a wholly owned subsidiary of Citigroup Financial Products Inc., which in turn is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc., which in turn is a wholly owned subsidiary of Citigroup, Inc., a publicly held corporation. No other publicly held company owns 10% or more of its stock.

Petitioner Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse (USA) Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse Group AG Guernsey Branch, which is a branch of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares, and (2) Credit Suisse AG, which itself is a wholly owned subsidiary of Credit Suisse Group AG and which has certain publicly registered securities. No publicly held company owns 10% or more of Credit Suisse Group AG.

Petitioner Deutsche Bank Securities Inc. is a jointly owned subsidiary of Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. No other publicly held company owns 10% or more of its stock.

Petitioner Goldman, Sachs & Co. is an indirectly wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group"), which is a corporation organized under the laws of Delaware and whose shares are publicly traded on the New York Stock Exchange. To the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

Petitioner J.P. Morgan Securities Inc. is a wholly owned subsidiary of JPMorgan Chase & Co., a public company whose shares are traded on the New York Stock Exchange. J.P. Morgan Securities Inc. is the surviving entity in the October 1, 2008 merger between J.P. Morgan Securities Inc. and Bear, Stearns & Co Inc., a former U.S. broker-dealer subsidiary of The Bear Stearns Companies Inc. No other publicly held company owns 10% or more of J.P. Morgan Securities Inc.'s stock.

Petitioner Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc., which is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Co., Inc.

Petitioner Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley, a publicly held corporation whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of its stock.

Petitioner Robertson Stephens, Inc. (now merged into a new entity called Robertson Stephens Group, Inc.) is a wholly-owned subsidiary of Bank of America Corporation. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

In this case, the Ninth Circuit held that the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), may be indefinitely tolled even *after* the receipt of actual notice of the facts giving rise to the claim. That holding squarely and concededly conflicts with the Second Circuit's rule that Section 16(b) tolling ends upon such notice. And, at an even broader level, both the Second and Ninth Circuits' tolling rules conflict with this Court's recognition that Section 16(b) establishes an absolute two-year period of repose that is not subject to tolling at all. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991); *see also id.* at 375 (Kennedy, J., dissenting). The Court should grant this petition to resolve these conflicts, and thereby to ensure the uniform, clear, and consistent interpretation of this "important federal statute." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972).

Specifically, Section 16(b) bars a defined set of corporate insiders from profiting from a "short swing" purchase and sale of corporate securities within a six-month period, and allows a shareholder—after adequate demand on the corporate issuer of those securities—to bring a cause of action for disgorgement on the issuer's behalf. The statute specifies, however, that "no such suit shall be brought more than two years after the date such profit was realized." *Id.*

Relying on circuit precedent, the Ninth Circuit held below that Section 16(b)'s two-year time limit is tolled until the insider discloses the relevant purchase or sale of securities in a filing with the Securities and Exchange Commission (SEC) under Section 16(a), 15 U.S.C. § 78p(a), *regardless* of whether and when the issuer on whose behalf the Section 16(b) claim is brought or its shareholders had actual notice of the facts giving rise to the claim. *See* App. 61-66a (citing *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981)). The author of the Ninth Circuit's opinion, Judge Milan Smith, wrote a special concurring opinion acknowledging that this tolling rule conflicts with the Second Circuit's rule that tolling under Section 16(b) ends when the issuer on whose behalf the claim is brought or its shareholders receives actual notice of the underlying facts. *See* App. 75a (citing *Litzler v. CC Invs. L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004)). Because the issuers on whose behalf this case was brought and their shareholders had actual notice of the underlying facts for at least six years before this lawsuit was filed, these complaints would have been time-barred if brought in the Second Circuit. Certiorari is warranted based on that conflict alone.

And even putting aside the Second and Ninth Circuits' conflicting tolling rules, this petition merits review because both circuits erred by holding that Section 16(b)'s two-year time limit is subject to tolling at all. As this Court has recognized in construing companion provisions of the federal securities laws, the specific language that Congress used in Section 16(b)—"no such suit shall be brought" after a specified statutory time limit has elapsed—establishes an absolute outer limit on the time for suing, and thereafter gives defendants total repose. Thus, in his special concurrence below, Judge Smith noted that, but for the Ninth Circuit's binding decision in *Whittaker*, he would construe Section 16(b) in tandem with its companion provisions as a period of repose not subject to tolling.

Given the lenient venue rules governing Exchange Act claims, there is little reason for plaintiffs whose Section 16(b) claims would be time-barred absent tolling to file anywhere other than the Second or Ninth Circuits. Those two courts of appeals have thus established a *de facto* nationwide rule permitting tolling of Section 16(b)'s two-year time limit notwithstanding this Court's recognition that this time limit establishes a period of repose. If Section 16(b) tolling is to be the law of the land, it should be declared by this Court, not the lower courts, and certainly should not operate differently in different circuits. Accordingly, this Court's review is warranted.

OPINIONS BELOW

The Ninth Circuit's opinion, as amended by the order denying the petitions for rehearing *en banc*, is reported at __ F.3d __, 2011 WL 135693, and is reprinted in the Appendix to the Petition ("App.") at 1-75a. The district court's opinion is reported at 602 F. Supp. 2d 1202, and reprinted at App. 78-111a.

JURISDICTION

The Ninth Circuit entered judgment on December 2, 2011, and denied timely petitions for rehearing on January 18, 2011. App. 35a, 76-77a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The full text of Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. § 78p, is reproduced in the Appendix. App. 112-15a.

STATEMENT OF THE CASE

1. In enacting the Securities Exchange Act of 1934, Congress "recognized that insiders may have access to information about their corporations not available to the rest of the investing public." *Foremost-McKesson, Inc. v. Provident Secs. Co.*, 423 U.S. 232, 243 (1976). Congress further recognized that, "[b]y trading on this information, these persons could reap profits at the expense of less well informed investors." *Id.* Congress responded to this problem in two ways.

a. Congress sought to prevent insiders from abusing their status by requiring them to disclose transactions involving securities in the relevant issuer. In particular, Section 16(a) of the Exchange Act requires "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of [a qualifying] equity security …, or who is a director or an officer of the issuer of such security," to file a disclosure statement with the SEC under certain circumstances—when a covered person owns a security newly registered on a national exchange, when a person previously not covered by the section becomes covered, or when a covered person makes a purchase or sale of the security. 15 U.S.C. § 78p(a)(1), (2). The disclosure statement must set forth the amount of equity that the filer beneficially owns, and must be updated in the event of a change of ownership. *Id.* § 78p(a)(3). Congress believed that this "publicity requirement …

would afford indirect protection against some potential misuses of inside information." *Foremost-McKesson*, 423 U.S. at 255-56.

b. While Congress enacted Section 16(a)'s disclosure requirement to afford "indirect protection" against misuse of inside information, *id.*, Congress also established more direct protection in Section 16(b) against one type of transaction that raised particular concerns: so-called "short-swing" trades, in which insiders buy and sell securities within a short period. "Prohibiting [such] short-swing trading by insiders with nonpublic information was an important part of Congress' plan in the 1934 Act to 'insure the maintenance of fair and honest markets.'" *Gollust v. Mendell*, 501 U.S. 115, 121 (1991) (quoting 15 U.S.C. § 78b). Congress enacted Section 16(b) "to eliminate such trading." *Id.*

That provision creates a "flat rule," *Reliance Elec.*, 404 U.S. at 422, prohibiting "any profit realized by [beneficial owners, directors, or officers] from any purchase and sale, or any sale and purchase, of any equity security of such issuer … within any period of less than six months" from the time of the issuance of the security. 15 U.S.C. § 78p(b). Section 16(b) further authorizes a suit to recover profits from a prohibited transaction, either "by the issuer" or, alternatively, in an action "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." *Id.*

But Congress strictly circumscribed the time period for bringing a Section 16(b) action. In particular, Congress specified that "no such suit shall be brought more than two years after the date such profit was realized." *Id.* Accordingly, as this Court has explained, "Section 16(b) … sets a 2-year … period of repose." *Lampf,* 501 U.S. at 360 n.5 (1991); *see also id.* at 375 (Kennedy, J., dissenting) (describing the "2-year statute of repose for actions brought under § 16 of the 1934 Act").

Congress also authorized the SEC to exempt transactions that the agency concludes do not pose an "intolerably great" risk of being exploited by insiders. *Reliance Elec.,* 404 U.S. at 422; *see also Dreiling v. American Exp. Co.*, 458 F.3d 942, 950 (9th Cir. 2006). "[Section 16(b)] shall not be construed to cover … any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U.S.C. § 78p(b). Pursuant to this statutory grant of authority, the SEC has established an "underwriting exemption" for "[a]ny purchase and sale, or sale and purchase, of a security that is made in connection with the distribution of a substantial block of securities" that is part of a good faith underwriting in the ordinary course of the underwriter's business. 17 C.F.R. § 240.16a-7(a); *see also* 17 C.F.R. § 240.16a-10 (extending underwriting exemption to Section 16(b) disgorgement liability).

2. a. This case involves Initial Public Offerings (IPOs) of equity securities that took place over a decade ago, during the stock market boom of 1998-2000. In 2001, after the bubble burst, over 1,000 lawsuits were filed against investment banks—including petitioners—alleging that they had engaged in "a vast scheme to defraud the investing

public" in the course of underwriting more than 300 IPOs. *In re Initial Pub. Offering Sec. Litig.* (*IPO*), 241 F. Supp. 2d 281, 293 (S.D.N.Y. 2003).

In particular, the *IPO* plaintiffs alleged that the investment banks artificially increased the price of the issuing companies' stock by requiring customers who received IPO allocations to purchase additional shares in the aftermarket at progressively higher prices (*i.e.*, "laddering"), and by issuing inflated research recommendations on issuers' stock. App. 83-84a; *IPO*, 241 F. Supp. 2d at 314-21. The *IPO* plaintiffs alleged that underwriters profited from this alleged scheme by requiring customers to pay them a portion of their profits (*i.e.*, kickbacks) and by obtaining additional investment banking opportunities. App. 84a; *IPO*, 241 F. Supp. 2d at 314-21. The parties to the *IPO* litigation eventually agreed to a settlement in 2009.

The IPOs at issue in the *IPO* litigation were also challenged under the antitrust laws. That lawsuit ultimately made its way to this Court, which held that the claims failed on the pleadings as a matter of law. *See Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 270-85 (2007). Justice Stevens, concurring in the judgment, noted that "[a]fter the initial purchase, the prices of newly issued stocks or bonds are determined by competition among the vast multitude of other securities traded in a free market," and dismissed as "frivolous" the suggestion "that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs." *Id.* at 286 (opinion concurring in the judgment).

b. Respondent Vanessa Simmonds, a college student, is the daughter of "a securities lawyer with experience in Section 16(b) litigation." App. 82a, 107-08a. In 2007, respondent's father bought her stock in 54 companies that had conducted IPOs in 1999 and 2000. App. 107-08a. Each of these IPOs had been challenged in the *IPO* litigation. App. 83a.

Shortly after the purchase of these securities on her behalf, respondent filed 55 virtually identical complaints in the United States District Court for the Western District of Washington. (She subsequently voluntarily dismissed one of the complaints. App. 82a n.4.) Each complaint parroted the factual allegations of the *IPO* plaintiffs. App. 82-83a. The complaints alleged that petitioners—the investment bank(s) involved in each of the challenged IPOs—were covered security owners for purposes of Section 16(a)'s disclosure obligations because they had been a direct or indirect "beneficial owner" of more than 10% of the stock of the issuing company. Respondent contended that petitioners thus were required to disgorge to the issuing company any "short swing" profits made on the purchase or sale of such securities within a six-month period under Section 16(b), 15 U.S.C. § 78p(b).

3. The district court (Robart, J.) dismissed all 54 complaints. App. 78-111a. The court dismissed 30 of the complaints without prejudice based on respondent's failure to make an adequate demand on the issuing company before filing suit. App. 92-102a. (Those complaints are not at issue in this petition. *See infra* n.1.)

The district court dismissed the remaining 24 complaints—the complaints at issue here—as time-barred under the two-year time limit in Section 16(b). App. 103-10a. The court recognized that, under the Ninth Circuit's decision in *Whittaker*, "an insider's failure to disclose covered transactions in the required Section 16(a) reports tolls the two-year limitations period" until "the transactions are disclosed in the insider's Section 16(a) report." App. 105-06a (citing *Whittaker*, 639 F.2d at 527). The district court further recognized that *Whittaker* had "rejected the more lenient 'notification' approach which triggers the running of the two-year period once the corporation (and thus indirectly the shareholders) has sufficient information to put it on notice of its Section 16(b) claims." App. 106a (citing *Whittaker*, 639 F.2d at 529).

The district court, however, concluded that *Whittaker* does not control this case. "Here, unlike *Whittaker* and other cases employing the equitable tolling doctrine in Section 16(b) cases, there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the [issuing companies] for at least five years before these cases were filed." App. 107a; *see also id.* at 108a ("[T]he only significant development occurring within the last two years was [respondent's] acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed."). In the district court's view, it was inequitable to apply tolling here, given "the novelty of [respondent's] theory" that the underwriters were required to file Section 16(a) disclosures and the absence of "any end date of liability for the issuing companies or the underwriters." App. 110a. Indeed, the district court noted that "[respondent's] counsel acknowledged that under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock." *Id.*

4. a. The Ninth Circuit reversed the district court's dismissal of 24 cases as time-barred.[1] App. 61-66a. The court of appeals rejected the district court's efforts to distinguish *Whittaker* on factual grounds, insisting that "the central holding of our opinion in *Whittaker*—both in our legal analysis and our application of the law to the facts of that case—is that the Section 16(b) statute of limitations is tolled until the [defendant] discloses his transactions in a Section 16(a) filing, *regardless* of whether the plaintiff knew or should have known of the conduct at issue." App. 63a (emphasis added); *see also* App. 65a ("[O]ur decision in *Whittaker* created a blanket rule that applies in *all* Section 16(b) actions.") (emphasis in original); App. 66a ("[T]he fundamental holding of *Whittaker* is that Section 16(b)'s two-year statute of limitations begins to run from the time that the defendant files a Section 16(a) disclosure

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[1] The court of appeals affirmed the district court's dismissal of the other 30 cases based on the inadequacy of respondent's demand, *see* App. 45-61a, and further held that those dismissals should have been with prejudice, *see* App. 66-70a. This petition concerns only the 24 cases in which the court of appeals reversed the district court's determination that the claims are time-barred. *See* App. 61-66a, 71a. None of these 24 cases has been the subject of a motion to dismiss based on the inadequacy of respondent's demand; indeed, the demand letters in these cases are not in the record. *See* App. 68-70a. Moreover, four of these cases involve non-Delaware issuers, in which the adequacy of respondent's demands will not be governed by Delaware law. App. 68-69a.

statement.”). Indeed, the Ninth Circuit emphasized that *Whittaker* had *rejected* a “notice” approach “under which the time period is tolled until the Corporation ha[s] sufficient information to put it on notice of its potential § 16(b) claim.” App. 62a (internal quotation omitted).

Under its “disclosure” approach, the Ninth Circuit acknowledged, a plaintiff could file a Section 16(b) claim “long after the corporation [is] on notice of the insider’s trading.” App. 63a. It is thus irrelevant that “much of the information described in the Complaints had been publicly disclosed in court filings, news reports, and the Issuing Companies’ IPO registration filings” as early as 2001, six years before this lawsuit was filed. App. 64a. Rather, the Ninth Circuit held, Section 16(b)’s two-year time limit was never triggered because petitioners never filed a Section 16(a) disclosure statement. App. 62-66a.

b. Judge Milan Smith, who authored the panel’s opinion, wrote a special concurrence. App. 72-75a. He identified “three alternatives” to the Ninth Circuit’s “disclosure” approach, App. 75a: (i) “the statute of repose approach” not subject to tolling at all, *id.* (citing *Lampf*, 501 U.S. at 360 n.5); (ii) “the actual notice approach” adopted by the Second Circuit, *id.* (citing *Litzler*, 362 F.3d at 208); and (iii) a “hybrid approach” advocated by one judge on the Second Circuit, allowing for Section 16(b) tolling only “in cases of ‘fraud or concealment,’” *id.* (citing *Litzler*, 362 F.3d at 208 n.5 (Jacobs, J., concurring)).

“Of these three approaches,” Judge Smith reasoned, “the statutory text and statutory structure clearly point toward the repose approach.” App. 75a.

Accordingly, "[w]ere it not for" *Whittaker*, he "would hold that Section 16(b) suits may not be brought more than two years after the short-swing trades take place," without any possibility of tolling. *Id.* That reading, he explained, was confirmed by this Court's decisions construing companion provisions of the federal securities laws with materially indistinguishable repose periods. App. 72-73a (discussing *Lampf*, 501 U.S. at 360-63, and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1797 (2010)). Judge Smith further explained that a "restrictive" time limit is "eminently logical" in this context: because "Section 16(b) imposes an inflexible penalty on corporate insiders even if they are not at fault and third parties are unharmed," it "makes no sense to allow individuals to be hauled into court years—or even decades—after they unintentionally violate Section 16." App. 73-74a.

Judge Smith therefore would have preferred to hold that no suit may be filed more than "two years after the insider's final profitable transaction, regardless of when—or even if—a Section 16(a) report is filed." App. 72a. Indeed, he "would have preferred to adopt *any one* of the three alternatives to *Whittaker*['s]" disclosure approach. App. 75a (emphasis added). But he ultimately "concur[red] with the panel's decision" because he believed himself "compelled to follow *Whittaker*." *Id.*

c. The court of appeals, over Judge Smith's objection on this issue, denied panel rehearing and rehearing *en banc*. App. 76-77a.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because the Second and Ninth Circuits disagree on whether actual notice of the facts underlying a Section 16(b) claim should end tolling of that provision's two-year time limit. This Court should further grant review because *any* tolling of the two-year time limit conflicts with this Court's decisions characterizing Section 16(b)'s two-year time limit as a statute of repose. Indeed, unless this Court grants review, those two courts effectively will have established a nationwide rule under which "claim[s] that affect[] long-settled transactions might hang forever over honest persons." *Litzler*, 362 F.3d at 208 n.5 (Jacobs, J., concurring).

A. The Courts Of Appeals Are Divided Over Whether Actual Notice Of Facts Giving Rise To A Section 16(b) Claim Suspends Tolling Of The Two-Year Time Limit.

As Judge Smith recognized below, the courts of appeals are divided over whether Section 16(b)'s two-year time limit is tolled despite actual notice of the facts underlying the suit. The Ninth Circuit holds that the time limit is tolled unless and until the defendant files a Section 16(a) disclosure, even if actual notice existed years beforehand. The Second Circuit, in contrast, holds that actual notice ends tolling.

1. a. In *Whittaker*, the Ninth Circuit first considered whether Section 16(b)'s two-year time limit is subject to tolling and, if so, to what extent. The court acknowledged that "[t]he bare words" of the statute "do not say whether tolling is or is not allowed," and that "the legislative history … is

silent" on this score. 639 F.2d at 527-28. Nonetheless, "examining the legislative purpose of § 16 as a whole and considering the place of the time provision in the overall legislative scheme," the court "infer[red] that tolling of the two year time period is required when the pertinent § 16(a) reports are not filed." *Id.* at 528. In particular, the court divined "a strong congressional intent to curb insider trading abuses," and "infer[red]" that tolling is necessary to prevent unscrupulous insiders from evading the disclosure requirements of Section 16(a). *Id.*

The court then addressed the question of when the tolling period should end. The court recognized that it could adopt either (1) "a 'notice' or 'discovery' interpretation under which the time period is tolled until the Corporation had sufficient information to put it on notice of its potential § 16(b) claim," or (2) a "'disclosure' interpretation under which the time period is tolled until the insider discloses the transactions at issue in his mandatory § 16(a) reports" *regardless* of whether the corporation was otherwise on notice of its claim. *Id.* at 527.

The court chose the latter interpretation, insisting that it was necessary to give full effect to the disclosure requirements of Section 16(a). *Id.* at 527-30. In particular, the court held "that an insider's failure to disclose covered transactions in the required § 16(a) reports tolls the two-year limitations period for suits under § 16(b)," and that "[t]he two-year period for § 16(b) begins to run when the transactions are disclosed in the insider's § 16(a) report." *Id.* at 530.

The Ninth Circuit thereby effectively rewrote the statute, transforming the filing deadline of two years after "the date [the challenged] profit was realized," 15 U.S.C. § 78p(b), into a filing deadline of two years after the date "the transactions are disclosed in the insider's § 16(a) report," *Whittaker*, 639 F.2d at 530. Although the *Whittaker* court characterized its rule as a form of "traditional equitable tolling," the rule does not take equitable considerations, such as whether the failure to file a Section 16(a) disclosure statement was "intentional or inadvertent," into account. *Id.* at 527 n.9. Rather, *Whittaker* established a bright-line rule: unless and until the defendant files a Section 16(a) disclosure statement, the two-year time limit in Section 16(b) is tolled. *Id.* at 527-30.

b. In sharp contrast to the Ninth Circuit in *Whittaker*, the Second Circuit in *Litzler* rejected the rule that tolling under Section 16(b) continues until the defendant files a disclosure statement under Section 16(a). Rather, the *Litzler* court adopted a "notice" approach, holding 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." 362 F.3d at 208.

Thus, the Second Circuit in *Litzler* remanded the case to allow the defendants (who concededly had not filed a Section 16(a) disclosure statement) to pursue a statute-of-limitations defense to a Section 16(b) claim. *See id.* at 204, 208-09. In particular, the court gave defendants the opportunity to prove that the issuer on whose behalf the Section 16(b) claim was brought had actual notice of the facts underlying the claim more than two years before it was brought.

See id. at 208 ("[T]olling would of course end on the date that [the issuer] received sufficient notice of a possible claim under Section 16(b).").

Judge Jacobs, the author of the majority opinion, explained in a separate footnote that he "would have preferred to say that the statute of limitations in Section 16(b) is equitably tolled only when the failure to file is intentional or unreasonable." *Id.* at 208 n.5. Such a rule, he reasoned, "would be consistent with the general principle that a federal statute of limitations may be equitably tolled when fraudulent or other conduct conceals the existence of a claim." *Id.* (quotation omitted). He expressed concern that "[o]ne possible effect of our holding ... is that a claim that affects long-settled transactions might hang forever over honest persons." *Id.* He thus "would prefer, absent such fraud or concealment, to preserve the operation of the statute of limitations in Section 16(b), which the Supreme Court has described in other contexts as a 'period of repose.'" *Id.* (quoting *Lampf*, 501 U.S. at 360 n.5).

c. The Ninth Circuit in this case reaffirmed its earlier decision in *Whittaker*, and refused to adopt the Second Circuit's "actual notice" standard. According to the Ninth Circuit, "the Section 16(b) statute of limitations is tolled *until the insider discloses his transactions in a Section 16(a)* filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." App. 63a (emphasis added). Thus, the Ninth Circuit holds that actual notice is irrelevant to tolling, whereas (as noted above) the Second Circuit holds that actual notice is dispositive.

In his special concurrence, Judge Smith acknowledged that the Ninth Circuit's approach conflicts with the Second Circuit's "actual notice approach." App. 75a (citing *Litzler*, 362 F.3d at 208).[2] Judge Smith concluded that the Ninth Circuit was bound to follow its *Whittaker* precedent, but opined that "*Whittaker*'s cure is worse than the disease it intended to address," because that decision effectively creates "never-ending liability for corporate directors, officers, and shareholders" notwithstanding the statutory two-year time limit. App. 74-75a (M. Smith, J., specially concurring).

This case highlights the untoward consequences of the Ninth Circuit's rigid tolling rule. Petitioners vigorously dispute respondent's contention that they were required to file Section 16(a) disclosures in the first place, given that (among other things) the SEC has generally exempted underwriters from that requirement. *See* 17 C.F.R. §§ 240.16a-7(a), 240.16a-10; *see generally* 15 U.S.C. § 78p(b) ("This subsection shall not be construed to cover … any transaction or transactions which the [SEC] by rules and regulations may exempt as not comprehended within the purpose of this subsection."). Under the Ninth Circuit's tolling rule, however, a person who does not file a Section 16(a) disclosure because he believes (correctly or incorrectly) that he is exempt from that provision can *never* invoke a timeliness defense to a

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[2] Judge Smith also recognized that the Ninth Circuit's approach differs from the "hybrid approach" proposed by Judge Jacobs, which would "toll[] the statute [only] in cases of 'fraud or concealment.'" App. 75a (citing *Litzler*, 208 n.5 (Jacobs, J., concurring)).

Section 16(b) claim. By embracing a tolling rule that turns solely on the defendant's actions rather than the plaintiff's knowledge, the Ninth Circuit has effectively stripped the very persons who may not be subject to Section 16 liability in the first place of a substantial Section 16 defense.

2. There can be no question that the result in this case would have been different under the Second Circuit's "actual notice" approach. The issuers here and their shareholders had actual notice of the facts underlying the Section 16(b) claims; indeed, as the district court explained, the issuers were co-defendants, along with petitioners, in the *IPO* litigation challenging the initial public offerings of the issuers' securities. *See* 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.") (emphasis added). Thus, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners]" were necessarily known to the issuers and their shareholders "at least five years before these cases were filed." App. 107a. It is only because the Ninth Circuit applied its rigid *Whittaker* approach to tolling, rather than the Second Circuit's more flexible *Litzler* approach, that the Ninth Circuit rejected petitioners' timeliness defense as a matter of law. *See* App. 61-66a.

B. Tolling Of Section 16(b)'s Two-Year Time Limit Conflicts With This Court's Precedents.

Putting aside the need for resolution of the conflict between the Second and Ninth Circuits on whether actual notice suspends tolling of Section 16(b)'s two-year time limit, certiorari is also warranted because the decisions of *both* the Second and Ninth Circuits conflict with this Court's precedents. Under those precedents, the two-year time limit in Section 16(b) is a statute of repose not subject to tolling at all.

As Judge Smith noted in his special concurrence below, tolling is inconsistent with a "straightforward textual reading" of Section 16(b). App. 72a. Section 16(b) unequivocally states that "no … suit shall be brought more than two years after the date [the prohibited "short-swing"] profit was realized." 15 U.S.C. § 78p(b). This Court has twice considered whether time limits in companion provisions of the federal securities laws allow for tolling. On both occasions, the Court held that the provisions created an absolute bar to actions brought beyond the statutory time limit.

In *Merck*, the relevant statute provided that suit "may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). This Court held that "Congress' inclusion in the statute of an unqualified bar on actions instituted '5 years after such violation' … giv[es] defendants *total repose* after five years." 130 S. Ct. at 1797 (emphasis added; quoting 28 U.S.C. § 1658(b)). Tolling therefore could not apply. *Id.*

In *Lampf,* this Court considered the operation of various time limits found in the federal securities laws, such as one stating 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(e). The Court explained that the "3-year limit is a *period of repose inconsistent with tolling*. … Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." 501 U.S. at 363 (emphasis added).

To be sure, "[t]ime requirements in law-suits ... are customarily subject to 'equitable tolling.'" *Id.* at 363 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)). But "[i]t is important to distinguish statutes of limitations from statutes of repose." 4 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1056 (3d ed. 2010). "Although the commencement date for the applicable statute of limitations may be deferred and hinge upon the injured party's discovery of the existence of the cause of action, the point of commencement for the applicable statute of repose is commonly the date of the last act or omission that caused the plaintiff's injury." *Id.* And "a critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling." *Id.*

Like the time limits at issue in *Lampf* and *Merck*, Section 16(b) establishes a period of repose. As in *Lampf* and *Merck*, the time period begins to run when the violation occurs, *viz.*, "the date [the prohibited "short-swing"] profit was realized." 15 U.S.C. § 78p(b); *compare* 15 U.S.C. § 78i(e) (suit must be brought "within three years after such violation"); 28 U.S.C. § 1658(b) (suit may be brought "not later than … 5 years after such violation"). Indeed, this Court in *Lampf* specifically equated

Section 16(b) with those provisions it held did not allow for tolling, stating that "Section 16(b) … sets a 2-year rather than a 3-year *period of repose*." 501 U.S. at 360 n.5 (emphasis added); *see id.* at 375 (Kennedy, J., dissenting) (recognizing that Section 16(b) establishes "a 2-year statute of repose"). As Judge Smith observed, there is "little meaningful distinction" between the language of Section 16(b)'s two-year time limit and the relevant language of companion periods of repose. If Congress had wanted to subject the timeliness of a Section 16(b) lawsuit to the filing of a Section 16(a) disclosure, or the plaintiffs' discovery of some set of facts, it could and would have said so, as it did in other provisions of the federal securities laws. *See* 15 U.S.C. § 78i(e) ("No 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. § 78r(c) (similar).

By contrast, a "restrictive" time limit is "eminently logical" in the context of Section 16(b). App. 73a (M. Smith, J., concurring). That provision, after all, establishes a "flat rule," *Reliance Elec.*, 404 U.S. at 422, that categorically bars insiders from any purchase or sale of an equity security within six months of issuance, *regardless* of whether they engage in any "unfair use of information." 15 U.S.C. § 78p(b); *see also Reliance Elec.*, 404 U.S. at 422 ("Section 16(b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation."); *Dreiling*, 458 F.3d at 947 ("[Section 16(b)] is over-inclusive in that it imposes strict liability regardless of motive, including trades not actually based on inside information.”). Given the strict-liability nature of Section 16(b), there is no reason to construe that provision’s time limit to leave the specter of liability hanging over potential defendants in perpetuity.

Unless this Court grants review and resolves whether the two-year time limit in Section 16(b) is subject to tolling, the tolling holdings of the Second and Ninth Circuits will become the *de facto* nationwide rule. Under the lenient venue rules governing Exchange Act suits, venue lies in any district where “any act or transaction constituting the violation occurred,” or where “the defendant is found or is an inhabitant or transacts business.” 15 U.S.C. § 78aa. Given that the “transaction constituting the violation” of Section 16(b) is an equity transaction, and every major national equity exchange is within the Second Circuit, as well as the expansive geographic scope of the Ninth Circuit, it is hard to imagine that Section 16(b) plaintiffs who wish to invoke tolling would file anywhere else. Indeed, nearly all reported decisions addressing Section 16(b) tolling arise in those two circuits. *See, e.g.*, *Dreiling v. America Online, Inc.*, No. C05-1339, 2005 WL 3299828, at *4 (W.D. Wash. Dec. 5, 2005); *Dreiling v. American Exp. Travel Related Servs. Co.*, 351 F. Supp. 2d 1077, 1082-83 (W.D. Wash. 2004), *rev’d on other grounds*, 458 F.3d 942 (9th Cir. 2006); *Rosen ex rel. Egghead.Com, Inc. v. Brookhaven Capital Mgmt. Co.*, 179 F. Supp. 2d 330, 337-38 (S.D.N.Y. 2002); *Morales v. Executive Telecard, Ltd.*, No. 95 Civ. 10202, 1998 WL 314734, at *2-3 (S.D.N.Y. June 12, 1998).

Because the two circuits principally responsible for adjudicating Section 16(b) claims have both held that the two-year time limit in that provision is subject to tolling (albeit subject to different tolling rules), there is no reason for any plaintiff whose suit would be time-barred absent tolling to risk suing in any other circuit. It is thus especially important that this Court grant review and definitively resolve the threshold question whether Section 16(b) suits are subject to tolling at all, lest the Second and Ninth Circuits effectively resolve that important legal question for the Nation by default.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

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Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
ANDREW B. CLUBOK
BRANT W. BISHOP, P.C.
SUSAN E. ENGEL
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com
Counsel for Petitioner Morgan Stanley & Co. Inc.

CHRISTOPHER B. WELLS
RYAN P. MCBRIDE
LANE POWELL PC
1420 Fifth Ave., Ste. 4100
Seattle, WA 98101
Petitioners' Liaison Counsel

SRI SRINIVASAN
ANTON METLITSKY
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, DC 20006

ANDREW J. FRACKMAN
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Counsel for Petitioners Bank of America Corp., Robertson Stephens, Inc., & Merrill Lynch, Pierce, Fenner & Smith Inc.

DAVID W. ICHEL
JOSEPH M. MCLAUGHLIN
SIMPSON THACHER & BARTLETT LLP
425 Lexington Ave.
New York, NY 10017
Counsel for Petitioners J.P. Morgan Securities Inc. & Bear, Stearns & Co., Inc.

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
SULLIVAN & CROMWELL LLP
125 Broad St.
New York, NY 10004
Counsel for Petitioner Goldman, Sachs & Co.

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, DC 20005

JOEL M. MITNICK
JUDITH WELCOM
SIDLEY AUSTIN LLP
787 Seventh Ave.
New York, NY 10019
Counsel for Petitioner Deutsche Bank Securities Inc.

FRASER L. HUNTER
DAVID S. LESSER
WILMER CUTLER PICKERING HALE & DORR LLP
399 Park Ave.
New York, NY 10022
Counsel for Petitioners Credit Suisse Securities (USA) LLC & Citigroup Global Markets Inc.