No. ______

In the Supreme Court of the United States

BULLDOG INVESTORS GENERAL PARTNERSHIP,
Petitioner,

v.

DEBORAH DONOGHUE,
MORGAN STANLEY HIGH YIELD FUND, INC.
(NOW KNOWN AS INVESCO HIGH YIELD INVESTMENT FUND, INC.),
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2011, the Court granted a Petition for Writ of Certiorari in *First Am. Fin. Corp v. Edwards.*, 131 S. Ct. 3022 (2011) ("*First American*") to decide whether a federal statute's grant of a private cause of action for its violation is, by itself, sufficient to give an uninjured private plaintiff constitutional standing to sue in federal court. *First American* was briefed and argued, but not decided, because the Court dismissed the writ. 132 S. Ct. 2536 (2012).

The Second Circuit Court of Appeals considered the Supreme Court's dismissal of the writ in *First American* in reaching the decision appealed here.

The questions in this case are:

1. Did the Second Circuit err by holding that the Respondents had Article III, § 2 standing to prosecute this action in federal court under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), in the absence of any allegation that the Petitioner's statutory violation injured any Respondent?

2. Did the Second Circuit err by holding that § 16(b) creates a "fiduciary duty," (found nowhere in the statute) which is owed by every 10% stockholder of a public company and whose breach is always an "injury-in-fact" to the company?

CORPORATE DISCLOSURE STATEMENT

Petitioner Bulldog Investors General Partnership, through its counsel, states that it has no corporate parents, affiliates and/or subsidiaries which are publicly held.

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INTRODUCTION

Petitioner Bulldog Investors General Partnership ("Bulldog") is a private investment fund. Bulldog bought more than 10% of the registered common stock of Respondent Morgan Stanley High Yield Fund, Inc. (n/k/a "Invesco High Yield Investments Fund, Inc.") ("Invesco") in open market transactions. Despite its investment, Bulldog was the consummate "outsider," with an arm's length adversarial relationship with Invesco's management, as the Complaint in this action acknowledged.

In open market transactions between November 2009 and March 2010, while it was a 10% holder, Bulldog sold certain Invesco shares for $85,491 more than the lowest prices it paid to buy an equal number of Invesco shares (the "short-swing profit").

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) ("1934 Act"), provides that an issuer (here, Invesco) may sue and recover a short-swing profit from any 10% beneficial owner (here, Bulldog). Section 16(b) further provides that if the issuer refuses to sue (as Invesco did here), anyone else may buy a single share of its stock and prosecute the § 16(b) recovery action derivatively on its behalf. A specialty bar of lawyers sifts through reports filed by 10% holders with the Securities and Exchange Commission, looking for such transactions, from which they can then profit through fee awards in § 16(b) lawsuits. These lawyers employ house plaintiffs to buy a nominal amount of the stock and sue. Respondent Deborah Donoghue ("Donoghue"), a serial § 16(b) plaintiff, and her regular § 16(b) lawyer, followed this process and sued Bulldog derivatively on Invesco's behalf, in the United States District Court for the Southern District of New York.

Bulldog admitted violating § 16(b), but moved to dismiss the case for lack of subject matter jurisdiction. As a derivative plaintiff, Donoghue's standing was dependent upon Invesco's standing. Bulldog acknowledged Invesco's statutory standing under § 16(b). But Bulldog challenged Invesco's standing under Article III § 2 of the U.S. Constitution, because the Complaint alleged no fact that, if true, would constitute an actual injury to Invesco. Absent an "injury-in-fact," Invesco lacked standing and the District Court lacked subject matter jurisdiction.

The District Court denied Bulldog's motion, holding Invesco's as-yet unsatisfied statutory entitlement to Bulldog's short-swing profits was its injury-in-fact. App. 31a-32a. The Second Circuit affirmed, holding that the "plaintiff's claim of injury in fact depends on legal rights conferred by [the] statute." App. 16a. The Second Circuit went further, holding that § 16(b) creates a "fiduciary duty" (found nowhere in the statute) owed by all 10% holders to issuers "not to engage in short-swing trading." App. 15a. The Second Circuit held that Bulldog's "breach" of this fiduciary duty was Invesco's injury-in-fact. App. 12a-15a.

The Court should grant review of the Second Circuit's decision.

First, the Second Circuit's decision echoes a persistent conflict among federal courts over whether Congress can by statute expand the Article III jurisdiction of the federal courts to no-injury statutory liability cases prosecuted by private plaintiffs for personal profit. Clarification of this recurring issue is of exceptional importance to federal courts considering a wide variety of such statutory liability claims and the companies subject to such claims.

Some federal courts have required allegations of actual injury in statutory violation cases to satisfy the constitutional "hard floor" of injury-in-fact, pointing to *Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997), where the Court wrote "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Other courts have adopted a more expansive concept of injury "in-fact" in statutory liability cases, and point to the Court's statement in *Warth v. Selden*, 422 U.S. 490, 500 (1975), that "[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'" (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973)).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1993), Justice Scalia, on behalf of the Court, reconciled these statements, writing that *Linda R.S.* approved "Congress elevating to the status of legally cognizable injuries, concrete *de facto* injuries that were previously inadequate at law," and noted that "'[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury'" (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)). However, Justice Kennedy's concurring opinion in *Lujan* stated: "In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view." *Id.* at 580 (Kennedy, J., concurring).

Different federal courts have cited these *Lujan* opinions to support conflicting holdings concerning the limits and breadth of standing that can be conferred by statutes to plaintiffs who suffered no actual injury. The Court should grant certiorari to resolve the conflict.

The seventeen separate *amicus* briefs filed for thirty separate trade associations, businesses and public interest groups in favor of the petitioners, and the twelve *amicus* briefs filed in support of the respondents in *First American Financial Corp. v. Edwards*, highlight the importance of the Court resolving this issue definitively. The petitioner-side *amicus* briefs apprised the Court of the widespread adverse commercial consequences of allowing uninjured plaintiffs to prosecute "bounty hunter" lawsuits for harmless statutory violations, and the damage to constitutional principles of separation of powers of allowing federal statutes to trump Article III's injury-in-fact requirement. The respondent-side *amici* argued for deference to Congress' choice to incentivize private plaintiffs to enforce federal laws. Notably, the Second Circuit cited the Court's dismissal of the *First*

American writ, 132 S. Ct. 2536 (2012), in support of its decision. App. 16a-17a.

The Article III injury-in-fact issue is more sharply defined in this case than it was in *First American*. In *First American*, the defendant, like the Petitioner here, violated the express terms of the relevant federal statute (the Real Estate Settlement Procedure Act ("RESPA")), 12 U.S.C § 2607(a)–(b), and the plaintiff, like Respondents here, satisfied the statute's standing requirements. *See Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) *cert. granted*, 131 S. Ct. 3022 (2011). However, unlike this case, the *First American* plaintiff and defendant were in commercial privity. The plaintiff bought an insurance policy from the defendant, and the RESPA violation was in connection with her purchase. *Id.* at 516. Here, Respondents did not allege privity between Invesco and Bulldog, or that Invesco was affected by Bulldog's short-swing open market trades.

<u>Second</u>, the Second Circuit's ruling is erroneous, conflating § 16(b)'s statutory standing and recovery provisions with the separate constitutional standing requirement. The Second Circuit's decision makes the "in-fact" component of "injury-in-fact" meaningless.

In a law review article titled *Article III Limits on Statutory Standing*, then-future Supreme Court Chief Justice John G. Roberts, Jr. wrote that injury-in-fact is an element of Article III standing that "is a limitation that Congress as well as the courts must respect." John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 DUKE L.J. 1219, 1226 (1993) (discussing *Lujan*). "Standing is an apolitical limitation on judicial power. . . . It precludes Congress from assigning a right to sue to those without injury whether the statutory interest sought to be judicially enforced is perceived as liberal or conservative." *Id*. at 1230.[1]

That aptly identifies the constitutional problem with this action. Requiring federal courts to adjudicate claims of an uninjured private civil plaintiff seeking a monetary recovery trespasses the boundaries of Article III.

Moreover, the Second Circuit's novel holding that § 16(b) creates an upside-down federal "fiduciary duty" owed by all 10% stockholders to the public companies in which they invest, is a far-reaching act of judicial legislation. No mention of a fiduciary duty appears in the text of the 1934 Act. When Congress intends to create a fiduciary duty under federal securities law, it does so expressly. *See, e.g.,* Section 36 of the Investment Company Act of 1940 (the "Investment Company Act"), 15 U.S.C. § 80a-35 (titled "Breach of Fiduciary Duty," and identifying what actions constitute such a breach of fiduciary duty). The Second Circuit's strained creation of a fiduciary duty under § 16(b) redefines the nature of the relationship between investors and public companies and trespasses the

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[1] In *Lujan*, Justice Scalia, for the majority had written: "[w]hether the Courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." *Lujan*, 504 U.S. at 576.

constitutional boundaries between the legislature and the judiciary.

The Court should grant a writ of certiorari and reverse.

OPINIONS BELOW

The Second Circuit's decision below is reported at 696 F.3d 170, and reprinted at App. 1a-19a. The Opinion and Order of the District Court is not reported but is available at 2010 WL 2143664, and reprinted at App. 27a-32a.

JURISDICTION

The Court of Appeals entered judgment on October 1, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> (b) Profits from purchase and sale of security within six months.
> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement

involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement or a security-based swap involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

STATEMENT OF THE CASE

Petitioner Bulldog was a 10% shareholder of Respondent Invesco. App. 35a (¶ 5). The Complaint acknowledges that Bulldog, an activist private investment fund, was the consummate outsider *vis-a-vis* Invesco, as evidenced by Bulldog's Form 13D filings and anti-management proxy solicitations. App. 37a (¶¶ 15-17). No person affiliated with Bulldog was alleged to have been an officer, director, employee or other person standing in a contractual, confidential or fiduciary relationship with Invesco. Nor did the Complaint allege that Bulldog had access to any of Invesco's inside information.

Between November 2009 and March 2010, while it beneficially owned more than 10% of Invesco's common stock, Bulldog sold certain shares of Invesco on the open market for $85,491 more than it paid to buy an equal number of shares during that period. App. 4a; App. 35a, 38a-39a (¶¶ 5, 21-31).

Donoghue commenced this action in the District Court on April 13, 2010, derivatively for Invesco, to recover Bulldog's short-swing profit under § 16(b) of the 1934 Act. App. 34a, 35a (¶¶ 2, 4). The Complaint pleaded the statutory elements of a § 16(b) claim for relief against Bulldog (which Bulldog admitted), but did not allege that Invesco was a counter party to, incurred any actual loss or damage from, or was otherwise affected by, Bulldog's short-swing trades.

On April 21, 2010, Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1). The Hon. Denise L. Cote of the

District Court denied Petitioner's motion in a Memorandum Opinion and Order dated May 27, 2010. App. 27a -32a.

Since Bulldog admitted the factual allegations of the Complaint and contested only the subject matter jurisdiction of the District Court, the parties entered into a Stipulation for Entry of Judgment dated September 8 and 10, 2010 (the "Stipulation"). Bulldog agreed to entry of judgment for the amount of its short-swing profit ($85,491), with a reservation of its rights to appeal the District Court's subject matter jurisdiction. On March 31, 2011, Judge Cote entered an Order and Final Judgment, adopting the Stipulation by reference. App. 20a-26a. Bulldog timely filed a Notice of Appeal on April 26, 2011.

On October 1, 2012, the Second Circuit Court of Appeals affirmed the judgment. App. 2a. The Second Circuit stated as its rule of decision the inconsistent principles that injury-in-fact is "'a hard floor of Article III jurisdiction that cannot be removed by statute,'" App. 8a (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)), but which can be satisfied by a statute's creation of a legal right, "'the invasion of which creates standing, even though no injury would exist without the statute,'" App.8a-9a (quoting *Linda R.S.*, 410 U.S. at 617 n.3). The Second Circuit held that § 16(b) created such a right and "injury" for Invesco. The Second Circuit went further and held that Bulldog owed a fiduciary duty to Invesco "created by § 16(b) [that] conferred upon Invesco an enforceable legal right to expect Bulldog to refrain from engaging in any short-swing trading in its stock. The deprivation of this right establishes Article III standing." App. 12a.

Petitioner timely appealed the Second Circuit's decision to this Court.

REASONS FOR GRANTING PETITION

I. THE SECOND CIRCUIT ERRED AND DEEPENED THE CONFLICT THE COURT LEFT UNRESOLVED WHEN IT DISMISSED THE WRIT OF CERTIORARI IN *FIRST AMERICAN v. EDWARDS*

A. Courts of Appeals Are Divided Over Whether Article III Permits Standing to Sue for a Statutory Violation That Causes No Injury to the Plaintiff

The Courts of Appeals are divided—and there is significant confusion—over whether a plaintiff's allegation of a statutory violation is alone sufficient to give the plaintiff Article III standing to prosecute a civil action to recover money in a federal court, when the plaintiff has not alleged any injury resulted from the violation.

Article III of the U.S. Constitution limits federal courts' jurisdiction to "cases" and "controversies." The Court has held that "one element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue." *Raines*, 521 U.S. at 818. Standing requires a plaintiff to allege (and eventually prove) it was injured by the defendant's conduct. *Allen v.*

Wright, 468 U.S. 737, 750 (1984). In *Lujan*, 504 U.S. at 590, the Court held that the "injury" that is the civil plaintiff's admission ticket to federal court must be an injury "in-fact," and that such an injury is an "irreducible minimum" of constitutional standing.

In *First American*, the plaintiff home buyer sued her title insurer for violations of the anti-kickback provisions of RESPA, 2607(a)–(b), whose terms make a violator liable to a home purchaser charged for the violator's service. *See First American*, 610 F.3d. at 515–16. However, the home buyer's complaint did not allege that the defendant's RESPA violation caused her to pay a penny more for her title insurance, or do anything differently than she would have otherwise. *See id.* However, the Ninth Circuit held that "[b]ecause RESPA gives [the plaintiff] a statutory cause of action," it supplies the necessary Article III injury in fact. 610 F.3d at 518. The Ninth Circuit followed the Third and Sixth Circuits' RESPA decisions in *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009) and *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009). In *Carter*, the Sixth Circuit held that Congress "has the authority to create a right of action whose only injury-in-fact involves the violation of [a] statutory right." *Carter*, 553 F.3d at 988. In *Alston*, the Third Circuit held that construing RESPA to create a cause of action "without a resultant monetary injury" did not violate Article III. *Alston*, 585 F.3d at 762.

Those holdings conflict with decisions under other (non-RESPA) federal statutes by the Tenth Circuit, the Third Circuit and a separate panel of the Second Circuit, all holding that a plaintiff who has not suffered an actual injury lacks standing under Article III, even if she has alleged a statutory violation for which Congress has created a private right of action.

In *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), the plaintiffs sued under the Fair Housing Act ("FHA") to challenge landlords' advertising of gender-segregated housing. The plaintiffs "did not allege the advertisements deterred them from seeking to rent the apartments," nor did they allege "any other injury stemming from the advertisements." *Id.* at 595. The Tenth Circuit acknowledged that "[s]tanding under the [FHA] is as broad as permitted by Article III," *id.* at 593, but concluded that plaintiffs' receipt of discriminatory advertisements was too abstract an "injury" to "provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal courts." *Id.* at 596 (internal citations omitted).

The Tenth Circuit reached a similar conclusion in *Heard v. Bonneville Billing & Collections*, Nos. 99-4092 & 99-4100, 2000 WL 825721 (10th Cir. June 26, 2000) (judgment noted at 216 F.3d 1087). There, the plaintiff alleged that a debt collector violated the Fair Debt Collection Practices Act ("FDCPA") by splitting statutory attorneys' fees with the attorney it hired to collect the plaintiff's debt. *See id.* at *1, *4. The Tenth Circuit held that the plaintiff's allegations of the defendant's statutory violation were not a substitute for the allegation of her own injury-in-fact. *Id.* at *5.

Despite upholding standing under RESPA without tangible injury in *Alston*, the Third Circuit has held in other cases that a defendant's statutory violation alone is insufficient to establish a private plaintiff's standing.

In *Fair Hous. Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998) ("*FHC II*"), and *Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998) ("*FHC I*"), the plaintiff, an organization opposing discrimination in housing, argued that, "because it holds the status of a private attorney general, it need show nothing more than a violation of [a statute] in order to establish Article III standing." *FHC II*, 141 F.3d at 443. The court "disagree[d]," explaining that "a violation of the Act does not automatically confer standing on any plaintiff." *Id.* at 443-44. Rather, the plaintiff must "demonstrat[e] [a] legally cognizable injury." *Id.* at 444; *see FHC I*, 141 F.3d at 78 (holding that the same plaintiff lacked standing because it failed to show that it "suffer[ed] *actual injury* as a result of the defendant's conduct") (internal quotations omitted and emphasis in original); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (holding that plaintiffs lacked standing for violations of the Lanham Act because they failed to allege that defendants' alleged misconduct harmed them and thus could not show the required "injury-in-fact"); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.").

In *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), a panel of the Second Circuit (not including judges who decided this case) held that a retirement plan participant and purported class representative lacked constitutional standing to sue under certain provisions of the

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054, despite the plaintiff's allegation that the defendant plan administrator "deprived her of her right to a plan that complies with ERISA . . . as a result of [its] breach of its fiduciary duty" under 29 U.S.C. § 1104. *Kendall,* 561 F.3d at 121. Notwithstanding the defendant's alleged violation of a federal statute that *expressly* made it a fiduciary to the plaintiff, and a pleaded breach of that duty, the Second Circuit dismissed on Article III grounds, holding "Kendall cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of her entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Id*. In other words, the Second Circuit could find no injury-in-fact to *Kendall* despite the defendant's alleged breach of the express statutory fiduciary duty it owed her. The Second Circuit's attempt to distinguish *Kendall*, App. 15a-16a, on the basis of a "specific" as opposed to "general" fiduciary duty is strained beyond reason. *Kendall* cannot be reconciled with the Second Circuit's decision in this action.

(i) <u>District Courts have also reached conflicting conclusions on this issue</u>

A Nebraska District Court recently noted its disagreement with three district courts that "have held that when an ATM operator fails to provide a fee notice on the exterior of the ATM as required by the [Electronic Fund Transfer Act], the statutory violation is in itself an injury—regardless of whether the plaintiff had actual knowledge of the fee through the on-screen notice and affirmatively accepted it."

Charvat v. First Nat. Bank of Wahoo, 8:12-cv-97, 2012 WL 2016184, at *2 (D. Neb. June 4, 2012), *appeal filed,* No. 12-2797 (8th Cir. July 26, 2012) (citing *Campbell v. Hope Cmty. Credit Union,* No. 10–2649–STA, 2012 WL 423432, at *2 (W.D. Tenn. Feb. 8, 2012); *Kinder v. Dearborn Fed. Sav. Bank,* No. 10–12570, 2011 WL 6371184, at *4–5 (E.D. Mich. Dec. 20, 2011); *In re Regions Bank ATM Fee Notice Litig.,* Nos. 2:11–MD–1000, 1001, 1002, & 2202–KS–MTP, 2011 WL 4036691, at *3 (S.D. Miss. Sept. 12, 2011)). In *Charvat*, the district court held that such a statutory violation is not the same thing as injury-in-fact under Article III. *Id*. at *3-4 ("[T]his Court is respectful of the constitutional minimum requirement of standing that a plaintiff must have to proceed in an action before the Court. This limitation on judicial power is no mere formality: it 'defines with respect to the Judicial Branch the idea of separation of powers on which the federal government is founded.'" (quoting *Dominguez v. UAL Corp.,* 666 F.3d 1359, 1361 (D.C. Cir. 2012))); *see also McClure v. Carter*, 513 F. Supp. 265, 266 (D. Idaho 1981), *aff'd*, 454 U.S. 1025 (1981) (a pre-*Lujan* decision where the court rejected a U.S. Senator's challenge to a judicial appointment on standing grounds, even though a Congressional act specifically gave "any Member of Congress" the right to challenge such appointment); *Native Am. Arts, Inc. v. Specialty Merchandise Corp.*, 451 F. Supp. 2d 1080, 1081-83 (C.D. Cal. 2006) (holding that a distributor of Indian arts and crafts had statutory standing, but lacked constitutional standing to sue to recover damages provided for under the Indian Arts and Crafts Enforcement Act ("IACA"), because "[a]lthough plaintiff may not ever be called upon under the IACA to prove any actual damages in this action, Article III of the

United States Constitution requires proof of such damages in order to have access to the federal courts to establish and collect upon such a claim.").

B. The Second Circuit's Decision Which Grants Article III Standing Without Actual Injury Is Erroneous and Dilutes to the Point of Insignificance the Requirement of "Injury-In-Fact"

The absence of an injury "in fact," i.e., a real injury, cannot be excused by statute. *Raines*, 521 U.S. at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself. . . .").

On November 28, 2011, at the oral argument in *First American*, Chief Justice Roberts identified the precise constitutional standing issue presented here:

> CHIEF JUSTICE ROBERTS: You said violation of a statute is injury in. fact. I would have thought that would be called injury in law. And when we say, as all our standing cases have, is that what is required is injury in fact, I

> understand that to be in contradistinction to injury in law. And when you tell me all that you've got or all that you want to plead is violation of the statute, that doesn't sound like injury in fact.

Transcript of Oral Argument at *31, *Edwards v. First Am. Fin. Corp.*, (No. 10-708), 2011 WL 5910176 (U.S. Nov. 28, 2011) ("RESPA Oral Argument").

Here, the Second Circuit held that, notwithstanding the absence of any pleaded actual injury, Invesco's statutory entitlement under § 16(b) to Bulldog's short swing profits alone satisfied Article III's injury-in-fact standing threshold, echoing the "circular" argument made by the home buyer in *First American*.[2] The Complaint does not allege that Invesco was a counter-party to any of Bulldog's purchases or sales, that Invesco incurred any losses, lost profit or diminution in assets from such transactions, that Bulldog misappropriated any property or opportunity belonging to Invesco, or that Bulldog owed or breached any contractual or fiduciary duty to Invesco. Indeed, no

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[2] JUSTICE KENNEDY: But -- but it's circular for you to say he was denied something that he is entitled to. The question is whether there is an injury. The Constitution requires an injury.

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JUSTICE KENNEDY: If you were to say he was entitled to it and therefore, there is an injury, that's just – that's just circular. That gives no substance at all to the -- to the meaning of the term "injury."

RESPA Oral Argument at * 45.

allegation was made that Bulldog's short-swing trading affected Invesco at all. The Second Circuit's decision diminished the "injury-in-fact" requirement to a mere formality that can be satisfied by reference to a defendant's statutory violation and a plaintiff's statutory standing. But an "injury-in-law" is not the same as an "injury-in-fact," and the admitted existence of the former cannot substitute for the latter. The Second Circuit's decision would make the words "in-fact" meaningless. While Congress can by statute *elevate* a "concrete, *de facto* injur[y]" that was "previously inadequate at law" to the status of a cognizable tort, it cannot create the harm out of whole cloth. *See Lujan*, 504 U.S. at 578 (emphasis in original).

No matter how salutary its purposes (Section 16(b), states it was adopted "[f]or the purpose of preventing the unfair use of information"), Congress cannot convert an "undifferentiated public interest" in fair securities markets "into an individual right by a statute that denominates it as such, and that permits all citizens (or for that matter, a subclass of citizens who suffer no concrete harm) to sue." *Lujan,* 504 U.S. at 576–77. Courts have long commented upon the sweeping breadth—indeed, the over-breadth—of Section 16(b). *See, e.g.*, *Gwozdzinsky v. Zell / Chilmark Fund L.P.*, 156 F.3d 305, 310 (2d Cir. 1998) (the Supreme Court has "recognize[d] the overbreadth of Section 16(b)" (citing *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973))). In this particular case, involving a "*de facto*" outsider, § 16(b)'s reach exceeds its grasp and hits a constitutional wall.

This action is unlike § 16(b) cases involving officers or directors. State law establishes (expressly) they do owe fiduciary duties to their companies. This is also unlike many § 16(b) cases involving 10% holders who do have access to inside information or other agreements or arrangements with company management, that could imply such access. Here, the Complaint pleaded—accurately—the opposite. Bulldog was the classic *outsider*. App. 37a (¶¶ 15-17). These facts place this case at the outer boundary of § 16(b), and require the Court to focus only on the constitutional standing principle applicable to a no-injury-alleged complaint for a statutory violation, not the constitutionality of the statute itself. The Court's proper adjudication of this appeal would require only that private plaintiffs in civil actions asserting statutory violations allege injury "in-fact" and that federal courts consider the issue on a case-by-case basis.

C. The Second Circuit Erred By Holding That § 16(b) Creates an Implied Fiduciary Duty Owed by 10% Holders to Public Companies

The Second Circuit held that Bulldog owed a "fiduciary duty" to Invesco "created by Section 16(b) [that] conferred upon Invesco an enforceable legal right to expect Bulldog to refrain from engaging in any short-swing trading in its stock. The deprivation of this right establishes Article III standing." App. 12a.

That holding was clear error. The text of the statute makes no mention of a "fiduciary duty." If Congress intended to create such a fiduciary duty, it could have done so as it did explicitly in Section 36 of the Investment Company Act, 15 U.S.C. § 80a-35.[3]

The Second Circuit's addition of a fiduciary duty to § 16(b) is judicial legislation. Its awkwardly circumscribed definition of the duty demonstrates why such efforts are ill-advised. If Bulldog had actual inside information, (a fact which was not alleged here), and sold its shares at a penny's loss within the six month period—or sold for a billion dollar profit after holding its shares for six months and one day—just ahead of a massive drop in the stock's price, there would be no breach of the Second Circuit's newly defined fiduciary duty. Yet, any inadvertent and harmless (to Invesco) "gotcha" like the one discovered by Donoghue's lawyer here would be a breach of fiduciary duty.

Nowhere in § 16(b), elsewhere in the 1934 Act, or elsewhere in the law is there mention of a "fiduciary duty" that minority stockholders owe to issuers. The term "fiduciary" describes the duty of a first party who has undertaken by agreement with a second party to

[3] Compare the statutory standing provisions of § 16(b) with the more constitutionally sensitive provisions of Section 20A of the 1934 Act, 15 U.S.C. § 78t-1 (enacted in 1988), which provides and limits a private right of action to a contemporaneous purchaser or seller against one who trades on the basis of actual (not presumed) inside information. Unlike the passive and unaffected issuer given statutory standing by § 16(b), a contemporaneous purchaser or seller was either the counter-party to the trade at issue, or in an efficient market may have been injured by having paid or received a price affected by the contemporaneously trading defendant's non-disclosure.

act for or on behalf of the second party in circumstances which give rise to a relationship of trust and confidence. *See, e.g., Pepper v. Litton*, 308 U.S. 295, 306 (1939) (stating that the "standard fiduciary obligation" in public corporations is the fiduciary duty owed by directors and controlling stockholders to the corporation and its stockholders). Even a breach of an *express* fiduciary duty, by itself is not necessarily an injury-in-fact. The breach must be the proximate cause of the actual injury. *See* Restatement (Second), Torts § 874 (1979). ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

The Second Circuit used fiduciary duty as pretext to support the circular reasoning by which it affirmed the judgment. By labeling all 10% holders "fiduciaries" and short-swing trading a breach of the fiduciary's duty, the Second Circuit *avoided* the question raised by this action of whether a violation of a statute which provides for a private right of action is, standing alone, sufficient to give an uninjured plaintiff constitutional standing to prosecute its claim for monetary relief in federal court.

D. This is a Well-Positioned Case for the Court to Resolve a Recurring and Fundamental Constitutional Question of Great Practical Importance

This appeal raises an issue of great practical relevance and constitutional significance meriting this Court's intervention. Whether a statutory right of action is sufficient to give a plaintiff Article III standing affects private rights of action under multiple federal statutes.[4] Litigants and courts should have straightforward guidance from the Court whether "injury-in- fact" requires an actual injury or whether an injury "*de jure*" is sufficient. The Second Circuit's holding renders meaningless the Court's admonition that "the requirement of injury in fact . . . cannot be removed by statute." *Summers*, 555 U.S. at 497.

By granting certiorari in *First American* the Court deemed a very similar question to be worthy of its consideration.[5] The impact of deciding this core

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[4] The *amicus* brief filed by Facebook, Yahoo!, LinkedIn, and Zynga in *First American* listed the following privacy statutes as just a few examples: (i) the Telephone Consumer Protection Act, (ii) the Video Privacy Protection Act, (iii) the Cable Communications Privacy Act, (iv) the Fair Credit Reporting Act, (v) the Electronic Funds Transfer Act, (vi) the Drivers Privacy Protection Act, and (vii) the Electronic Communications Privacy Act. Brief for Facebook et al. as Amici Curiae Supporting Petitioner, *First Am. Fin. Corp. v. Edwards*, (No. 10-708), 2011 WL 3857211 (U.S. 2012).

[5] In *First American*, the Supreme Court certified the second of the following two questions presented for review:

> 1. Did the Ninth Circuit err in holding that a private purchaser of real estate settlement services has standing under RESPA to maintain an action in federal court in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided?
>
> 2. Does such a purchaser have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has

constitutional principle is evidenced by the 29 *amicus* briefs filed in *First American*—17 siding with petitioners and 12 siding with respondents.[6]

> interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

First Am. Fin. Corp. v. Edwards, 131 S. Ct. 3022 (2011).

[6] The following parties filed *amicus* briefs in *First American:* ACA International; American Land Title Association; Association of Global Automakers; Consumer Data Industry; DRI-the Voice of the Defense Bar and Association of Southern California Defense Counsel; Experian Information Solutions, Inc.; Facebook, Inc., LinkedIn, Yahoo, Inc. and Zynga Inc.; National Association of Home Builders and California Industry Association; New England Legal Foundation, Associated Industries of Massachusetts and U.S. Chamber of Commerce; Pacific Legal Foundation and Center for Constitutional Jurisprudence; Real Estate Service Providers Council, Inc.; Stewart Information Services Corp.; Public Law Professors; American Grant Title Association; American Bankers Trade Association, American Escrow Association, Consumer Bankers Association, Community Mortgage Banking Project, Consumer Mortgage Coalition, Financial Services Round Table, The Mortgage Bankers Association, and The National Association of Realtors; Electronic Privacy Information Center; Reporter for the Restatement (Third) of Restitution and Unjust Enrichment; AARP, Center for Responsible Lending, National Consumer Law Center, National Consumers League; Lawyers' Committee of Civil Rights Under law, NAACP Legal Defense and Education Fund, Washington Lawyers' Committee for Civil Rights and Urban Affairs, National Fair Housing Alliance; National Association of Independent Title Agents; Attorneys General for Missouri, Alaska, California, Hawaii, Illinois, Iowa, Mississippi, Nevada, New Mexico, Washington, West Virginia; Brief of the U.S. – Donald B. Verrilli, Solicitor General; as well as various economists and law professors.

This petition presents a more sharply defined opportunity than *First American* did for the Court to clarify whether Congress' enactment of a statute that establishes a right to sue and the measure of recovery for a defendant's violation of a statute, is itself sufficient to satisfy the Article III limitations on the subject matter jurisdiction of federal courts.

CONCLUSION

The Petition for writ of certiorari should be granted.

Dated: January 2, 2013

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2011
(Argued: June 21, 2012 Decided: October 1, 2012)

Docket No. 11-1708-cv

[Filed October 1, 2012]

DEBORAH DONOGHUE,

Plaintiff-Appellee,

v.

BULLDOG INVESTORS GENERAL PARTNERSHIP, PHILLIP GOLDSTEIN,

Defendants-Appellants.

Before:

POOLER, RAGGI, and LYNCH, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York (Denise L. Cote, *Judge*), awarding to plaintiff, suing on behalf of an issuer of securities, the short-swing profits realized by defendants from trading in the issuer's stock in violation of Section 16(b) of the Securities Exchange Act of 1934, see 15 U.S.C. § 78p(b). Defendants challenge plaintiff's constitutional standing to maintain this action, arguing that the proscribed trading caused no actual injury to the issuer as required to establish a genuine case or controversy.

AFFIRMED.

KEENAN D. KMIEC (James A. Hunter, *on the brief*), Hunter & Kmiec, Los Angeles, California; David Lopez, Esq., Southampton, New York, *for Plaintiff-Appellee*.

RICHARD W. COHEN (Scott V. Papp, Uriel Rabinovitz, *on the brief*), Lowey Dannenberg Cohen & Hart, P.C., White Plains, New York, *for Defendants-Appellants*.

REENA RAGGI, *Circuit Judge*:

Defendants Bulldog Investors General Partnership and principal Phillip Goldstein (collectively, "Bulldog") appeal from a judgment entered on March 31, 2011, by the United States District Court for the Southern District of New York (Denise L. Cote, *Judge*), in favor of plaintiff Deborah Donoghue suing on behalf of Invesco High Yield Investments Fund, Inc. ("Invesco"). The judgment awards plaintiff $85,491.00, representing profits realized by Bulldog from "short-swing" trading in Invesco common shares in violation of Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), see 15 U.S.C. § 78p(b) ("§ 16(b)"). Bulldog argues that the judgment must be vacated for lack of standing because plaintiff failed to demonstrate that the proscribed short-swing trading caused Invesco actual injury as necessary to satisfy the case-or-controversy requirement of Article III of the Constitution.[1] Specifically, although Bulldog concedes that § 16(b) prohibited it, as the beneficial owner of more than 10% of Invesco's common stock, from engaging in any short-swing trading, it submits that in the absence of further wrongdoing, plaintiff cannot claim any cognizable injury resulting from that trading. We disagree and, therefore, affirm the judgment.

I. Background

The facts relevant to this disgorgement action are straightforward and largely undisputed. During July 2008, Bulldog filed a beneficial ownership report on Schedule 13D with the Securities and Exchange Commission, reporting the hedge fund's ownership of nearly two million shares, comprising almost 15%, of the common stock of Invesco, a diversified closed-end management investment company.[2] In the publicly available Schedule 13D, Bulldog characterized its

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[1] Because Bulldog concedes plaintiff's satisfaction of all statutory requirements to maintain this § 16(b) action, we need only address the question of constitutional standing in this opinion.

[2] The complaint names as a nominal defendant the Morgan Stanley High Yield Fund, predecessor in interest to the Invesco fund in question, whose shares continue to trade publicly on the New York Stock Exchange under the ticker symbol "MSY."

acquisitive purpose to include "'consider[ing] whether to take actions intended to afford all shareholders an opportunity to realize net asset value for their shares,'" which "'may include submitting a shareholder proposal, seeking representation on [Invesco's] board of directors and conducting a tender offer to acquire additional shares.'" Compl. ¶ 15 (quoting Schedule 13D). To this end, Bulldog allegedly has attempted on several occasions to make demands upon Invesco's management and to persuade other shareholders to vote in opposition to management proposals. See id. ¶ 17.

Between November 2009 and March 2010, while continuing beneficially to own more than 10% of Invesco's outstanding common stock, Bulldog purchased and then sold 200,000 additional Invesco shares on the open market, realizing a profit of $85,491.00. Section 16(b) effectively prohibits such short-swing trading by a 10% beneficial owner of an issuer's equity securities, by providing that the realized short-swing profits "shall inure to and be recoverable by the issuer." 15 U.S.C. § 78p(b). Donoghue, an Invesco shareholder, requested that Invesco sue Bulldog for violating § 16(b) and when, after 60 days, the company failed to take such action, Donoghue herself commenced this suit for disgorgement in April 2010. See id. (setting forth demand requirement and waiting period before shareholder may instigate § 16(b) lawsuit).

Bulldog moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of constitutional standing, maintaining that plaintiff failed to allege any actual injury to Invesco from Bulldog's short-swing trades. The district court denied Bulldog's motion, relying on the language of § 16(b), which affords the issuer a legally protected interest in proscribed short-swing profits, and Gollust v. Mendell, 501 U.S. 115, 118 (1991), which holds that a shareholder plaintiff's ongoing financial interest in recovering short-swing profits pursuant to § 16(b) is sufficient to satisfy the injury-in-fact requirement of Article III as to that shareholder. See Donoghue v. Morgan Stanley High Yield Fund, No. 10 Civ. 3131 (DLC), 2010 WL 2143664, at *1–2. (S.D.N.Y. May 27, 2010).

Following this denial, the parties stipulated to the entry of judgment against Bulldog in the total amount of the alleged short-swing profits, with Bulldog preserving the right to appeal the district court's standing determination.

II. Discussion

In conducting de novo review of the denial of a Rule 12(b)(1) motion to dismiss for lack of standing, we borrow from the familiar Rule 12(b)(6) standard, construing the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); accord W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d 100, 106 (2d Cir. 2008).

A. Section 16(b)

A vital component of the Exchange Act, § 16(b) was designed to prevent an issuer's directors, officers, and principal stockholders "from engaging in speculative transactions on the basis of information not available to others." Huppe v. WPCS Int'l Inc., 670 F.3d 214, 218 (2d Cir. 2012); see Kern Cnty. Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 608 (1973) (observing that congressional investigations leading to enactment of Exchange Act "revealed widespread use of confidential information by corporate insiders to gain an unfair advantage in trading their corporations' securities"). Section 16(b) does not itself proscribe trading on inside information.[3] Rather, Congress determined that the "only method . . . effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422 (1972); see also Huppe v. WPCS Int'l Inc., 670 F.3d at 218 (stating that "no showing of actual misuse of inside information or of unlawful intent is necessary to compel disgorgement" under § 16(b)). Thus, § 16(b) was crafted as a "blunt instrument," Magma Power Co. v. Dow Chem. Co., 136 F.3d 316, 321 (2d Cir. 1998), to "impose[] a form of strict liability," Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1417 (2012) (internal quotation marks omitted), by stating that any profits accruing to a director, officer, or 10% beneficial owner of an issuer "within any period of less than six months . . . shall inure to and be recoverable by the issuer," 15 U.S.C. § 78p(b); see Analytical Surveys, Inc. v. Tonga Partners, L.P., 684

[3] Such a prohibition has since been derived from the "antifraud provisions found in section 10(b) and SEC Rule 10b-5." 4 Thomas L. Hazen, Law of Securities Regulation: Insider Trading & Rule 10b-5 § 12.17 (6th ed. rev. 2012).

F.3d 36, 43 (2d Cir. 2012) (observing that § 16(b) establishes 10% beneficial owners as "statutory insiders" who, like directors and officers, are required "to disgorge all profits realized from any purchase and sale (or sale and purchase) of the same security made within a six month period").

In contrast to "most of the federal securities laws, § 16(b) does not confer enforcement authority on the Securities and Exchange Commission." Gollust v. Mendell, 501 U.S. at 122. Rather, the statute authorizes two categories of private persons to sue for relief: (1) "the issuer" of the security traded in violation of § 16(b); or (2) "the owner of any security of the issuer in the name and in behalf of the issuer," but only "if the issuer shall fail or refuse to bring such suit within sixty days after the request or shall fail diligently to prosecute the same thereafter." 15 U.S.C. § 78p(b). It has been suggested that the statute thus recruits the issuer (and, if necessary, its security holders) as "'policemen'" by imbuing them with "'a private-profit motive'" to enforce the law's prohibition on short-swing trading by insiders. Gollust v. Mendell, 501 U.S. at 124–25 (quoting Hearings on H.R. 7852 and H.R. 8720 before House Committee on Interstate & Foreign Commerce, 73d Cong., 2d Sess. 136 (1934) (testimony of Thomas G. Corcoran)).

B. Constitutional Standing

It is undisputed that the complaint in this case adequately alleges a § 16(b) claim against Bulldog and that Donoghue, as an Invesco shareholder, is a person statutorily authorized to file such a claim. Bulldog nevertheless contends that the district court was without jurisdiction to hear the claim because it presents no live case or controversy affording plaintiff standing to sue. See U.S. Const. art. III, § 2; W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d at 106 (distinguishing statutory standing from constitutional standing in securities fraud context). Bulldog submits that the absence of a case or controversy is evident from plaintiff's inability to satisfy the first requirement of constitutional standing: an injury in fact. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. at 560–61 (identifying "injury in fact," "causation," and "redressability" as three elements of constitutional standing); accord W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d at 106.[4]

The injury in fact required to support constitutional standing is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. at 560–61 (internal quotation marks and citations omitted); accord W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d at 106. While the injury-in-fact requirement "is a hard floor of Article III jurisdiction that cannot be removed by statute," Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009), it has long been recognized that a legally protected interest may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing, even though no injury would

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[4] Bulldog does not challenge plaintiff's satisfaction of the causation and redressability requirements of standing. Thus, in this opinion we discuss only the requirement of an injury in fact.

exist without the statute," Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973); accord Warth v. Seldin, 422 U.S. 490, 500 (1975); see also Lujan v. Defenders of Wildlife, 504 U.S. at 578 (stating that nothing in denying standing to citizens at large to enforce public rights contradicts principle that statutes may confer rights on specified individuals, the breach of which suffices for standing).

With these principles in mind, we consider plaintiff's standing to sue under § 16(b) in this case.

C. Section 16(b) Confers on Issuers a Legal Right to the Short-Swing Profits of Insiders Sufficient To Establish Constitutional Standing

While Bulldog acknowledges that it engaged in precisely the type of short-swing trading in Invesco stock that § 16(b) proscribes, it argues that it cannot be sued for that violation because Invesco, and therefore Donoghue, cannot demonstrate the injury in fact necessary for constitutional standing. Where, as here, a shareholder plaintiff pursues a § 16(b) claim on behalf of an issuer, the claim "is derivative in the sense that the corporation is the instrument . . . for the effectuation of the statutory policy." Magida v. Cont'l Can Co., 231 F.2d 843, 846–47 (2d Cir. 1956); see 15 U.S.C. § 78p(b) (authorizing security holder to bring suit only "in the name and in behalf of the issuer"); Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001) (referring to § 16(b) suit by shareholder as "derivative suit"). In such cases, there appear to be two steps to injury analysis. First, because a derivative action generally is "a mere procedural device to enforce" substantive rights belonging to the issuer, Phillips v. Tobin, 548 F.2d 408, 411 (2d Cir. 1976); see Gollust v. Mendell, 501 U.S. at 127 (recognizing that security holder "will have no direct financial interest in the outcome of [§ 16(b)] litigation, since any recovery will inure only to the issuer's benefit"), there must be injury in fact to that real party in interest, see generally Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004) (setting forth widely accepted definition of derivative claim as one "asserting injury to the corporate entity" and requesting "relief that would go [to] the corporation"). Second, the Supreme Court has recognized that when an issuer's interests are pursued derivatively by a shareholder, a "serious constitutional question" would arise if the shareholder were allowed to maintain the § 16(b) claim even after losing all personal financial interest in the outcome of the litigation. Gollust v. Mendell, 501 U.S. at 126.[5]

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[5] Although Gollust indicated that the absence of such a shareholder's financial interest in the outcome of a § 16(b) derivative action would raise Article III concerns, see 501 U.S. at 125–26, we do not understand it to hold that such an interest is alone sufficient to demonstrate Article III standing in the absence of injury to the real party in interest, the issuer. Satisfaction of that standing requirement appears to have been undisputed and assumed in Gollust. We note that Gollust pre-dated the Supreme Court's 1998 ruling in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), holding that a federal court must satisfy itself as to "constitutional jurisdiction, including a determination that the plaintiff has Article III standing, before deciding a case on the merits." Alliance For Envt'l Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 85 (2d Cir. 2006) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. at 101)).

This second step of analysis need not detain us. Neither in the district court nor on appeal has Bulldog challenged Donoghue's allegation of a "continuing financial stake" in this litigation. Id. at 125. Instead, Bulldog argues that plaintiff cannot demonstrate any injury to the issuer from the alleged § 16(b) violation because Invesco "was a non-party to the trades at issue, and no issue of 'corporate opportunity,' fiduciary duty, breach of contractor misappropriation is on the table." Bulldog Br. 16. Indeed, Bulldog insists that it is a"consummate 'outsider,'" lacking any "fiduciary, contractual or confidential relationship with Invesco." Id. at 5. We reject Bulldog's argument as without merit. To explain, we must consider not only the purpose animating § 16(b), but the legal rights that Congress conferred on issuers in order to further that purpose. It is Bulldog's invasion of those rights that supports plaintiff's standing.

The purpose of § 16(b) is stated in its opening clause: to prevent "the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer." 15 U.S.C. § 78p(b). As we have already noted, to serve that purpose, Congress did not simply proscribe trading on inside information; rather, it enacted a "flat rule" that takes the profits out of an entire "class of transactions" occurring within a prescribed time frame "in which the possibility of abuse" of inside information "was believed to be intolerably great." Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. at 422. In discussing the reason for § 16(b)'s rule of strict liability, Judge Learned Hand observed that "[i]f only those persons were liable, who could be proved to have a bargaining advantage, the execution of the statute would be so encumbered as to defeat its whole purpose." Gratz v. Claughton, 187 F.2d 46, 50 (2d Cir. 1951) (reiterating well-settled principle "that a statute may provide any means which can reasonably be thought necessary to deal with the [identified] evil, even though they may cover instances where it is not present").

More pertinent to the questions of injury and standing that concern us today is Gratz's recognition that § 16(b)'s flat rule effectively makes 10% "beneficial owners fiduciaries as directors and officers were anyway," at least to the extent of making all short-swing transactions by such persons in the issuer's stock "breaches of trust." Id. at 49 (internal quotation marks omitted); see also Adler v. Klawans, 267 F.2d 840, 844 (2d Cir. 1959) (commenting that Congress's "intent in the enactment of § 16(b) was to discourage what was reasonably thought to be a widespread abuse of a fiduciary relationship" by "three classes of persons"). Thus, Bulldog cannot maintain that it owed no fiduciary duty to Invesco. That fiduciary duty was created by § 16(b), and it conferred upon Invesco an enforceable legal right to expect Bulldog to refrain from engaging in any short-swing trading in its stock. The deprivation of this right establishes Article III standing. See, e.g., Warth v. Seldin, 422 U.S. at 500.

Nor can Bulldog deny any injury to the issuer from its short-swing trading by pointing to the fact that § 16(b) operates without regard to whether the statutory fiduciaries were actually privy to inside information or whether they traded with the intent to profit from such information. This confuses the wrongdoing that prompted the enactment of § 16(b)—trading on inside information—with the legal right that Congress created to address that wrongdoing—a 10% beneficial owner's fiduciary duty to the issuer not to engage in any short-swing trading. As Judge Hand explained, even at common law, a fiduciary's duty to a beneficiary often required more than the avoidance of actual unfair dealing: "'A trustee with power to sell trust property is under a duty not to sell to himself either at private sale or at auction, whether the property has a market price or not, and whether the trustee makes a profit thereby.'" Gratz v. Claughton, 187 F.2d at 49 (quoting Restatement of Trusts § 170(1), cmt. b). Drawing an analogy between trust law and the fiduciary duty created by § 16(b), Judge Hand observed that "[n]obody is obliged to become a director, an officer, or a 'beneficial owner'; just as nobody is obliged to become the trustee of a private trust; but, as soon as he does so, he accepts whatever are the limitations, obligations and conditions attached to the position, and any default in fulfilling them is as much a 'violation' of law as though it were attended by the sanction of imprisonment." Id. (emphasis added).[6]

Thus, pursuant to § 16(b), when a stock purchaser chooses to acquire a 10% beneficial ownership stake in

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[6] Contemporary commentary recognizes the benefits of this "trust law approach" to fiduciary duty. See generally Robert H. Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 573 (2003) ("By rendering all evidence of intrinsic fairness irrelevant and employing a disgorgement remedy, the no-further-inquiry rule creates a strong incentive for trustees to abstain from self-dealing . . . .").

an issuer, he becomes a corporate insider and thereby accepts "the limitation[]" that attaches to his fiduciary status: not to engage in any short-swing trading in the issuer's stock. Id.[7] At that point, injury depends not on whether the § 16(b) fiduciary traded on inside information but on whether he traded at all. A corporate issuer, after all, has an "interest in maintaining a reputation of integrity, an image of probity," for its § 16(b)insiders "and in insuring the continued public acceptance and marketability of its stock." Diamond v. Oreamuno, 24 N.Y.2d 494, 499, 301 N.Y.S.2d 78, 82 (1969) (discussing New York law intended to remedy "the same sort of 'abuse of a fiduciary relationship' as is condemned by" § 16(b)). This interest is injured not only by actual insider trading but by any trading in violation of an insider's fiduciary duty, including the trading altogether prohibited by § 16(b). The fact that such injury to the issuer is not easily calculated does not make it less real for purposes of identifying an actual case or controversy. In any event, § 16(b) eliminates any calculation concerns by providing the issuer, upon breach of the fiduciary duty created by that statute, with the right to any profits realized from the unfaithful insider's short-swing trading.

To be sure, this statutory arrangement provides issuers (and their shareholders) with an incentive to police short-swing trading by beneficial owners,

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[7] Gratz suggests that beneficial owners, directors, and officers of an issuer may owe a duty to the purchasers of their shares. See 187 F.2d at 49. Because this case presents us with no occasion to discuss that point, we here focus only on the fiduciary duty that § 16(b) imposes in favor of the issuer.

directors, and officers, to the benefit of the market as a whole. Nevertheless, because the issuer's right to profits under § 16(b) derives from breach of a fiduciary duty created by the statute in favor of the issuer, the issuer is no mere bounty hunter but, rather, a person with a cognizable claim to compensation for the invasion of a legal right. This distinguishes the instant case from Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000), a qui tam action under the False Claims Act, in which the Supreme Court ruled that a claimant needs more than an interest in "the bounty he will receive if the suit is successful" to establish constitutional standing. Id. at 772–73 (comparing such interest to "wager" on suit's outcome). The claimant's alleged "interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." Id. (holding relator-plaintiff to satisfy injury-in-fact requirement in False Claims Act case due to statute's implied partial assignment of government's damages claim). As we recognized in Gratz, § 16(b) effectively gives issuers a legally protected fiduciary right to expect statutory insiders not to engage in short-swing trading of their stock, and compensates them for the violation of that right by allowing them to claim any profits realized from such trading.

Further, because the fiduciary obligation created by § 16(b) is not general, but rather confers a specific right on issuers to expect their insiders not to engage in short-swing trading, this case is distinguishable from Kendall v. Employees Retirement Plan of Avon Products, 561 F.3d 112 (2d Cir. 2009). There, we held that an ERISA plaintiff bringing a disgorgement claim could not satisfy the injury requirement of standing by alleging defendant's general "breach of fiduciary duty under ERISA without a showing of individualized harm." Id. at 120 (rejecting proffered Article III injury of "right to a plan that complies with ERISA"). Instead, such a plaintiff "must allege some injury or deprivation of a specific right that arose from a violation of that duty." Id. at 119.

In distinguishing these cases, we note that where, as here, a plaintiff's claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination. See generally Warth v. Seldin, 422 U.S. at 500 ("Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."). Thus, just as § 16(b) and the fiduciary right it effectively confers on issuers are distinct from the right to maintain a qui tam action under the False Claims Act or the right to sue for breach of fiduciary duty under ERISA, so are they distinct from the right to recovery afforded by the Real Estate Settlement Procedures Act of 1974 ("RESPA"), see 12 U.S.C. § 2601 et seq., relied on in Edwards v. First American Corp., 610 F.3d 514, 515 (9th Cir. 2010), to support standing.

The parties discuss Edwards at length because that standing determination was pending review in the Supreme Court at the time we heard oral argument. See No. 10-708, 131 S. Ct. 3022 (June 20, 2011) (granting writ of certiorari in part). In Edwards, the Ninth Circuit upheld a plaintiff's standing to sue under RESPA to recover three times the amount of any charge paid for real estate settlement services provided in violation of that law even though the plaintiff did not—and could not—allege that the charges were higher than they would have been but for the violation. See 610 F.3d at 516 (observing that state law dictated that all providers charge same specified amount for settlement services at issue). Nevertheless, because it construed RESPA's text to confer on plaintiff a legal right to recovery without regard to an overcharge, the Ninth Circuit held that the plaintiff had satisfied the injury requirement of Article III. See id. at 517. In light of the Supreme Court's dismissal of its writ of certiorari, see No. 10-708, 132 S. Ct. 2536 (June 28, 2012) (dismissing writ as improvidently granted), Edwards remains good law in the Ninth Circuit, and has been cited approvingly in our own, see Galiano v. Fid. Nat'l Title Ins. Co., 684 F.3d 309, 315 n.9 (2d Cir. 2012) ("An allegation of overcharge is not necessary to sustain a [RESPA] claim." (citing Edwards v. First Am. Corp., 610 F.3d at 518)).

To the extent this case differs from Edwards, the differences provide greater support for recognizing plaintiff's standing here. Unlike RESPA, § 16(b) is not a law that permits defendants to engage in particular conduct, specifically, short-swing trading, subject to certain conditions. Much less is this a case in which Bulldog can argue that, although it failed to comply with § 16(b), the prices at which it bought and sold Invesco shares and the profit realized therefrom were all dictated by some law that applied uniformly to all buyers and sellers, negating the possibility of actual injury to anyone. As we recognized in Gratz, § 16(b) is a statute that addresses the problem of insider trading by conferring on securities issuers a legal right, one that makes 10% beneficial owners "constructive trustee[s] of the corporation," 187 F.2d at 48, with a fiduciary duty not to engage in short-swing trading of the issuer's stock at the risk of having to remit to the issuer any profits realized from such trading. It is the invasion of this legal right, without regard to whether the trading was based on inside information, that causes an issuer injury in fact and that compels our recognition of plaintiff's standing to pursue a § 16(b) claim here.

While this particular legal right might not have existed but for the enactment of § 16(b), Congress's legislative authority to broaden the injuries that can support constitutional standing is beyond dispute. "Statutory broadening of the categories of injuries that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." Lujan v. Defenders of Wildlife, 504 U.S. at 578 (internal quotation marks and brackets omitted). While the principle is not so elastic as to permit the general "public interest in proper administration of the laws [to] be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue," id. at 576–77, that is hardly this case.

Although Congress enacted § 16(b) to serve a general interest in safeguarding the integrity of the stock market against insider trading, it did not eliminate the injury requirement of standing. Rather, it created legal rights that clarified the injury that would support standing, specifically, the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock. Such an injury in fact to Invesco having been satisfactorily alleged in this case, we reject Bulldog's standing challenge as without merit.

III. Conclusion

To summarize, we conclude that short-swing trading in an issuer's stock by a 10% beneficial owner in violation of Section 16(b) of the Securities Exchange Act causes injury to the issuer sufficient for constitutional standing.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 10 Civil 3131 (DLC)

[Filed March 31, 2011]

DEBORAH DONOGHUE,	)
	)
Plaintiff,	)
	)
-against-	)
	)
MORGAN STANLEY HIGH YIELD FUND, INC. (Now Known As INVESCO HIGH YIELD INVESTMENTS FUND, INC.,	)
	)
Nominal Defendant,	)
	)
BULLDOG INVESTORS GENERAL PARTNERSHIP and PHILLIP GOLDSTEIN,	)
	)
Defendants.	)
	)

ORDER AND FINAL JUDGMENT

On the 25th day of February, 2010, a hearing was held before this Court to determine (1) whether the terms and conditions of the Stipulation of Settlement, dated September 8 and 10, 2010, (the "Stipulation") are fair, reasonable and adequate for the settlement of all claims asserted by Deborah Donoghue (the "Plaintiff'), derivatively on behalf of Morgan Stanley High Yield Fund, Inc., Now Known as Invesco High Yield Investments Fund, Inc. ("Invesco") in the action now pending in this Court under the above caption, against Bulldog Investors General Partnership and Phillip Goldstein (collectively the "Defendants"), should be approved; (2) whether judgment should be entered dismissing the Complaint with prejudice as it relates to Phillip Goldstein and whether judgment should enter against Bulldog Investors General Partnership; (3) whether the application of Plaintiff's counsel for attorney's fees and reimbursement of disbursements necessarily incurred in the prosecution of this action may be filed with this court within thirty days of the issuance in this matter of a Mandate by the United States Court of Appeals for the Second Circuit.

This action (the "Action") was brought by Plaintiff on behalf of Invesco to recover alleged "short-swing profits" under Section 16(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Court, having considered all matters submitted to it at the hearing and otherwise during the course of proceedings in this Action; and it appearing that a Notice of Hearing substantially in the form approved by the Court was mailed to all persons or entities (the "Invesco Shareholders") reasonably identifiable from Sechedule 13D or Schedule 13G filings with the Securities & Exchange Commission who owned more than 5% CSI common stock within two years of September 8, 2010, the date of the Stipulation, and the posting of such notice on a dedicated web site; and after a review of the record herein, the Stipulation and other papers submitted to the Court, and having concluded that the settlement should be approved:

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Court has jurisdiction over the subject matter of this action, over the Plaintiff, over Invesco and over the Defendants.

2. Notice of the pendency of this Action and the proposed settlement thereof was given to all Invesco Shareholders owning more than 5% of Invesco shares within two years of the date of the stipulation who could be identified with reasonable effort, and to all Invesco Shareholders by means of an internet posting on a dedicated web site. The method of notifying the Invesco Shareholders of the pendency of this Action and of the settlement and of the terms and conditions meet the requirements of Fed. R. Civ. P. 23.1, Local Civil Rule 23.1 and due process, and constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities thereto.

3. The Stipulation of Settlement (a copy of which is on file with the court) is hereby approved as fair, reasonable and adequate and in the best interests of Invesco and its shareholders. Judgment shall enter against Bulldog in the amount of $85,491.00 with interest from the date hereof. The complaint is dismissed with prejudice against Phillip Goldstein.

4. This Order and Final Judgment shall not constitute evidence or an admission by the Defendants or any other person that any transaction giving rise to liability or damages under Section 16(b) occurred, or that any violations of law or acts of other wrongdoing have been committed, and shall not be deemed to create any inference that there is or was liability of any person therefore. The Settling Defendants do not admit, either expressly or implicitly, that they or any one of them is subject to any liability whatsoever by reason of any of the matters alleged in the Complaint or referenced in the Stipulation of Settlement, or that there is any merit to any of the claims for damages sought therein. The Defendants, on the contrary, expressly deny and dispute the existence of any such liability.

5. The Complaint solely as it relates to the Defendants, each claim therein against the Defendants, and this Action to the extent it relates to the Defendants are hereby dismissed on the merits, with prejudice and without costs, except as shall otherwise be provided in the award of an attorney's fee, costs and disbursements, if any, at such time as application shall be made; and the Settling Defendants and the other related parties referred to below are hereby discharged and released, except as noted in the direction for entry of judgment, from any and all liability and damages under or based upon any and all claims, rights, causes of action, suits, matters, demands, transactions and issues, known or unknown, that have been or could have been or might have been asserted in or that relate to the Action or matters, transactions, occurrences, or claims alleged in the Complaint by Plaintiff on behalf of herself or any other person or entity, by Invesco

and/or by any and all owners of any security (as defined in Section 3(a)(10) of the Exchange Act) issued by Invesco, or any of them, whether individually, directly, representatively, derivatively or in any other capacity, against defendant or any of its present, future or former officers, directors, employees, agents, attorneys, representatives, advisors and affiliates (as defined in Rule 12b-2, promulgated pursuant to the Exchange Act), associates (as defined in Rule 12b-2, promulgated pursuant to the Exchange Act), parents, principals, subsidiaries, general or limited partners or partnerships, investment advisory clients, and brokers, and each of their heirs, executors and assigns. These claims are hereby compromised, settled, released, discharged and dismissed with prejudice and without costs (except as provided herein) by virtue of the proceedings herein and this Order and Final Judgment. This Order and Final Judgment shall be conclusive with respect thereto.

6. The Plaintiff, Invesco and all owners of any security (as defined in Section3(a)(10) of the Exchange Act) issued by Invesco or, if a derivative security, underlain by any security issued by Invesco, either individually, directly, derivatively, representatively or in any other capacity, and any of their present, future or former officers, directors, employees, agents, attorneys, representatives, advisors, trustees, parents, principals, subsidiaries, general and limited partners, heirs, executors, administrators, successors and assigns or anyone else, are, except as noted at the final sentence hereof, hereby severally and permanently barred and enjoined from instituting or prosecuting this or any other action, in this or any other court or tribunal of this or any other jurisdiction, based upon or

for the purpose of enforcing any and all claims, rights, causes of action, suits, matters and issues, known or unknown, that have been, could have been, or might have been asserted in this Action by Plaintiff on behalf of herself or any other person or entity, by Invesco and/or by any owner of any security issued by Invesco or, if a derivative security, underlain by any security issued by Invesco, whether individually, directly, representatively, derivatively or in any other capacity, against the Settling Defendants or any of them or any of their or its or his present or former officers, directors, employees, agents, attorneys, representatives, predecessors, shareholders, advisors and affiliates (as defined in Rule 12b-2, promulgated pursuant to the Exchange Act), associates (as defined in Rule 12b-2, promulgated pursuant to the Exchange Act), parents, principals, subsidiaries, general or limited partners or partnerships, investment advisory clients, and brokers, and each of their heirs, executors, administrators, successors and assigns, or anyone else, in connection with, or that arise now or hereafter out of, or relate in any way to the Action or the Stipulation of Settlement (except for compliance with the Stipulation of Settlement), or matters, transactions, occurrences, or claims alleged in the Complaint or referenced in the Stipulation herein.

7. The application of Plaintiff's counsel for attorney's fees and reimbursement of disbursements necessarily incurred in the prosecution of this action may be filed with this court within thirty days of the issuance in this matter of a Mandate by the United States Court of Appeals for the Second Circuit.

8. Jurisdiction is hereby reserved over all matters relating to the enforcement, administration and performance of the Stipulation of Settlement.

9. The Clerk of the Court is directed to enter and docket this Order and Final Judgment in this Action.

Dated: New York, New York
March 30, 2011

/s/ Denise Cote
Denise L. Cote, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

10 Civ. 3131 (DLC)

[Filed May 27, 2010]

DEBORAH DONOGHUE,	)
Plaintiff,	)
	)
-v-	)
	)
MORGAN STANLEY HIGH	)
YIELD FUND,	)
Nominal Defendant,	)
	)
BULLDOG INVESTORS GENERAL	)
PARTNERSHIP	)
and PHILLIP GOLDSTEIN,	)
Defendants.	)
	)

MEMORANDUM OPINION & ORDER

APPEARANCES:

For plaintiff:

David Lopez
171 Edge of Woods Road
P.O. Box 323
Southhampton, NY 11968

For defendants:

Richard W. Cohen
Todd S. Garber
One North Broadway, Suite 509
White Plains, NY 10601

DENISE COTE, District Judge:

Plaintiff Deborah Donoghue ("plaintiff"), a shareholder in nominal defendant Morgan Stanley High Yield Fund (the "Fund"), brings this derivative action pursuant to Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78p(b). Plaintiff seeks to require defendants Bulldog Investors General Partnership and Phillip Goldstein (collectively, the "defendants"), who at all times relevant were the beneficial owners of more than ten percent of the Fund's common stock, to disgorge short-swing profits they realized in a series of stock transactions within a six-month period. On January 30, 2010, plaintiff made a demand upon the Fund to recover the short-swing profits from defendants. After more than sixty days expired without a recovery, plaintiff initiated this action on April 13.

On April 21, defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). While defendants concede that the complaint "pleads all of the statutory elements of a Section 16(b) claim," they argue that plaintiff lacks constitutional standing under Article III of the United States Constitution because the complaint fails to allege any "injury in fact" to the Fund or plaintiff as a result of their short-swing profits. The motion to dismiss became fully submitted on May 14.

Defendants' argument is without merit. The requirements for constitutional standing are well-established. "The 'irreducible constitutional minimum of standing,' rooted in Article III's case-or-controversy requirement, consists of three elements: (1) an 'injury in fact,' by which is meant 'an invasion of a legally protected interest'; (2) 'a causal connection between the injury and the conduct complained of'; and (3) a likelihood that 'the injury will be redressed by a favorable decision.'" Fulton v. Goord, 591 F.3d 37, 41 (2d Cir 2009) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). "The legally protected interest may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Fulton, 591 F.3d at 41 (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)).

Section 16(b) creates a legally protected interest in the disgorgement of short-swing profits realized by beneficial owners of more than ten percent of a company's stock that inures to the benefit of the company. "Section 16(b) provides that officers, directors, and holders of more than 10% of the listed stock of any company are liable to the company for any profits realized from any purchase and sale or sale and purchase of such stock occurring within a period of six months." Roth ex rel. Beacon Power Corp. v. Perseus L.L.C., 522 F.3d 242, 245-46 (2d Cir. 2008).[1] Section 16(b) is a "strict-liability provision; it requires the inside, short-swing trader to disgorge all profits realized on all purchases and sales within the six-month period, without proof of actual abuse of insider information, and without proof of intent to profit on the basis of such information." Roth v. Jennings, 489 F.3d 499, 507 (2d Cir. 2007) (citation omitted); see also Gollust v. Mendell, 501 U.S. 115, 122 (1991). "Any profit realized from such a transaction is recoverable by the corporation in a suit against the insider, brought either by the corporation itself or, as in this case, on behalf of the corporation by a

---

[1] Section 16(b) provides in pertinent part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) . . . within any period of less than six months, . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security . . . purchased or of not repurchasing the security ... sold for a period exceeding six months . . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security.

15 U.S.C. § 78p(b).

shareholder." Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 206 (2d Cir. 2006).

In Gollust v. Mendell, 501 U.S. 115, the Supreme Court addressed the question of who may maintain an action to enforce § 16(b). Id. at 121. The Court found that § 16(b) provides "standing of signal breadth" and requires only that a plaintiff be an owner of a security of an issuer at the time the lawsuit is instituted. Id. at 123-24. The Court observed, however, that "if a security holder were allowed to maintain a § 16(b) action after he had lost any financial interest in its outcome, there would be serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation on federal court jurisdiction." Id. at 125. But since "in the enactment of § 16(b), Congress understood and intended that, throughout the period of his participation, a plaintiff authorized to sue insiders on behalf of an issuer would have some continuing financial interest in the outcome of the litigation," the Court identified no "serious constitutional question" under Article III as to a shareholder's standing to bring suit under § 16(b). Id. at 126.

Defendants do not argue that the plaintiff in this case lacks a financial interest in the outcome of this litigation. To the contrary, defendants concede that plaintiff has fully satisfied all the statutory requirements in order to bring this action under § 16(b). As such, plaintiff's ongoing financial interest in ensuring that the Fund recovers the short-swing profits realized by defendants pursuant to § 16(b) is sufficient to satisfy the "injury in fact" requirement under Article III. Defendants' motion to dismiss for lack of standing is therefore denied.

CONCLUSION

Defendants' April 21, 2010 motion to dismiss is denied.

SO ORDERED:

Dated: New York, New York
May 27, 2010

/s/____________________________
DENISE COTE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 1:10-cv-03131-DLC

[Filed April 13, 2010]

DEBORAH DONOGHUE,	)
	)
Plaintiff,	)
	)
-against-	)
	)
MORGAN STANLEY HIGH YIELD FUND,	)
	)
Nominal Defendant,	)
	)
BULLDOG INVESTORS GENERAL	)
PARTNERSHIP and PHILLIP GOLDSTEIN,	)
	)
Defendants.	)
	)

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COMPLAINT FOR RECOVERY OF SHORT-SWING PROFITS UNDER 15 U.S.C. 78p(b)
Jury Trial Demanded

DEBORAH DONOGHUE, by David Lopez, Esq., her attorney, complaining of the defendants, respectfully alleges the following upon information and belief except as to paragraph 2 which plaintiff alleges on personal knowledge:

JURISDICTION:

1. This action arises under the provisions of Section 16(b) of the Securities Exchange Act of 1934, as amended (the "Act"), 15 U.S.C. Section 78p(b), and jurisdiction is conferred upon this court by Section 27 of the Act, 15 U.S.C. Section 78aa.

THE PARTIES:

2. Plaintiff is a security owner of MORGAN STANELY HIGH YIELD FUND ("THE FUND"), a Delaware corporation with principal offices at 522 Fifth Avenue, New York, New York 10036.

3. At all times relevant the common stock of THE FUND was and is registered under Section 12 of the Act and was and is traded on the New York Stock Exchange (symbol MSY) located within this district as well as on the NASDQ National Market System (Symbol XMSYX) through market makers located within this district.

4. This action is brought in the right and for the benefit of THE FUND which is named as a nominal party defendant solely in order to have all necessary parties before the court.

5. At all times relevant BULLDOG INVESTORS GENERAL PARTNERSHIP ("BULLDOG") was and is a beneficial owner of more than 10% of the common stock of THE FUND. PHILLIP GOLDSTEIN was and is President of Kimbell & Winthrop, Inc., the managing general partner of BULLDOG and shares in the profits of BULLDOG. By reason of his power to make investment decisions and to vote shares, he too is a beneficial owner of more than 10% of the common stock of THE FUND.

6. BULLDOG and PHILLIP GOLDSTEIN have offices, do business and may be found at Park 80 West. 250 Pehle Avenue, Suite 708, Saddle Brook, N.J.

STATUTORY REQUISITES:

7. The violations of Section 16(b) of the Act to be described herein involve non-exempt securities in non-exempt transactions engaged in by a non-exempt person within the meaning of the Act.

8. Demand for prosecution was made on THE FUND on January 30, 2010. No recovery has been effected. Further delay in the filing of suit would be a futile gesture the sixty day statutory waiting period having expired.

9. Some or all of the transactions to be described herein were effected in whole or in part within the

Southern District of New York on the floor of the New York Stock Exchange or through NASDAQ market makers located within the district.

10. THE FUND does business and is found within the Southern District of New York.

11. This action is brought within two years of the occurrence of the violations to be described herein or within two years of the time when reports required by Section 16(a) of the Act, 15 U.S.C. 78p(a), setting forth the substance of the transactions here complained of were first filed or will be filed with the Securities & Exchange Commission.

12. BULLDOG and PHILLIP GOLDSTEIN have failed to file any reports relating to their trading activities in securities of THE FUND under Section 16(a) of the Act, 15 U.S.C. 78p(a), thereby equitably tolling the running of the statute of limitations with respect to their trading activities in the securities of THE FUND under Section 16(b) of the Act, 15 U.S.C. 78p(b).

FIRST CLAIM FOR RELIEF:

13. At some time prior to July 8, 2008, BULLDOG and PHILLIP GOLDSTEIN acquired beneficial ownership of more-than-10% of the common stock of THE FUND.

14. On or about July 8, 2008, BULLDOG and PHILLIP GOLDSTEIN jointly filed with the Securities & Exchange Commission a Schedule 13D announcing their joint beneficial ownership of 1,711,826 shares of

THE FUND constituting 14.64% of all shares outstanding. Some of those shares may have been held in managed accounts other than BULLDOG's over which BULLDOG and/or PHILLIP GOLDSTEIN exercised voting and dispositive powers.

15. In that Schedule 13D, BULLDOG and PHILLIP GOLDSTEIN stated their purpose in acquiring such shares to be as follows: "The filing group will consider whether to take actions intended to afford all shareholders an opportunity to realize net asset value for their shares. Such actions may include submitting a shareholder proposal, seeking representation on the issuers [sic] board of directors and conducting a tender offer to acquire additional shares."

16. The stated purpose of BULLDOG and PHILLIP GOLDSTEIN constitutes the acquisition and holding of shares of THE FUND by them to have been done with a "purpose of effect of changing or influencing control" within the meaning of Rules 16a-1(a)1 and Rule 13d-3(b) promulgated under the Act.

17. In furtherance of this control purpose BULLDOG and PHILLIP GOLDSTEIN have attempted on several occasions to meet with the management of THE FUND to instruct it as to their demands and, on March 2, 2010, sent a letter to all shareholders of THE FUND, urging proxy votes in opposition to management proposals.

18. BULLDOG, PHILLIP GOLDSTEIN and any managed accounts whose shareholdings in THE FUND were or have been included in the shares reported on

Schedule 13D and amendments thereto as beneficially owned by BULLDOG and PHILLIP GOLDSTEIN constitute a "Group" for purposes of Section 13 of the Act and Rule 13d-3(b).

19. Between July 8, 2008, and September 10, 2009, BULLDOG and PHILLIP GOLDSTEIN reduced their aggregate beneficial ownership of shares of THE FUND by a net amount of 222,751 shares.

20. By reason of BULLDOG'S and PHILLIP GOLDSTEIN's failure to comply with the reporting requirements of Section 16(a) of the Act it is not possible for the plaintiff to enumerate the individual sales by which this reduction was accomplished nor to identify acquisitions which may have been made during this period.

21. Upon information and belief, BULLDOG and PHILLIP GOLDSTEIN made both purchases and sales of shares of THE FUND during the period between July 8, 2008, and September 10, 2009, some of the sales at prices higher than purchases within periods of less than six months.

22. Between October 29, 2009, and November 19, 2009, BULLDOG and PHILLIP GOLDSTEIN purchased 225,546 shares, more or less, of THE FUND.

23. On November 30, 2009, BULLDOG and PHILLIP GOLDSTEIN purchased 15,000 shares, more or less, of THE FUND.

24. On February 5, 2010, BULLDOG and PHILLIP GOLDSTEIN purchased 11,100 shares, more or less, of THE FUND.

25. Between January 14, 2010, and January 22, 2010, BULLDOG and PHILLIP GOLDSTEIN sold 43,800 shares, more or less, of THE FUND.

26. On February 18, 2010, BULLDOG and PHILLIP GOLDSTEIN sold 29,279 shares, more or less, of THE FUND.

27. On February 19 2010, BULLDOG and PHILLIP GOLDSTEIN sold 25,600 shares, more or less, of THE FUND.

28. Between February 22, 2010, and February 23, 2010, BULLDOG and PHILLIP GOLDSTEIN sold 20,554 shares, more or less, of THE FUND.

29. Between February 24, 2010, and March 1, 2010, BULLDOG and PHILLIP GOLDSTEIN sold 33,900 shares, more or less, of THE FUND.

30. All of the sales set out at paragraphs 25, 26, 27, 28 and 29 were made at prices higher than paid for the shares purchased as set out at paragraphs 22, 23 and 24, *supra,* thereby generating profits which, under the Act, accrue to the benefit, and are recoverable on behalf, of THE FUND by plaintiff.

31. The exact amounts of such profits are unknown to plaintiff by reason of the failure of BULLDOG and PHILLIP GOLDSTEIN to comply with

their reporting obligations under Section 16(a) of the Act.

SECOND CLAIM FOR RELIEF:

32. This Second Claim For Relief is a precaution against possible errors of detail attributable to inaccuracies in the public record, the failure of BULLDOG and PHILLIP GOLDSTEIN to file reports as required by Section 16(a) of the Act or against the discovery of additional trades during the course of this action.

33. BULLDOG and PHILLIP GOLDSTEIN, acting during periods not barred by the statute of limitations measured from the date of the filing of this complaint, purchased and sold or sold and purchased equity securities or equity security equivalents of THE FUND within periods of less than six months of each other while more-than-10% beneficial owners of THE FUND.

34. By reason of such purchases and sales or sales and purchases of its equity securities or equity security equivalents within periods of less than six months of one another while insiders of THE FUND, BULLDOG and PHILLIP GOLDSTEIN realized profits, the exact amounts thereof being unknown to Plaintiff, which profits inure to the benefit, and are recoverable by plaintiff on behalf, of THE FUND.

WHEREFORE, Plaintff demands judgment:

a) Requiring BULLDOG and PHILLIP GOLDSTEIN to account for and to pay over to THE

FUND the short-swing profits realized and retained by each of them in violation of Section 16(b) of the Act, together with appropriate interest and the costs of this suit;

b) Awarding to Plaintiff her costs and disbursements including reasonable attorney's, accountants and expert witness fees; and

c) Granting to Plaintiff such other and further relief as the court may deem just and proper.

Dated: Southampton, New York
April 12, 2010

Yours, etc.

/s/ David Lopez
David Lopez, Esq.