DISCOVERING CONCEALMENT: DEFINING THE LIMITS OF EQUITABLE TOLLING IN SECTION 16(B) OF THE SECURITIES EXCHANGE ACT

BORIS RAPPOPORT*

I. INTRODUCTION

The Securities and Exchange Commission (SEC) is tasked with two conflicting missions: it must protect investors and simultaneously maintain the integrity and efficiency of capital markets.[1] The SEC protects investors by imposing a disclosure regime that reduces information asymmetries between the public and corporate insiders.[2] Enhanced disclosure obligations, however, impose significant costs on corporations.[3] Balancing these two objectives is a delicate task, but one that should be reflected in any judicial construction of securities law. *Credit Suisse Securities (USA) LLC v. Simmonds*[4] will require the Supreme Court to apply this trade-off in the context of Section 16 of the Securities Exchange Act of 1934.

Section 16(a) of the Securities Exchange Act of 1934 provides that any director, officer, or beneficial owner of more than ten percent of any class of equity securities must disclose his ownership of such securities within ten days of becoming a beneficial owner of such security or within two days of any change in such ownership.[5] Section

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* J.D. Candidate, 2013, Duke University School of Law.

1. *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC, www.sec.gov/about/whatwedo.shtml (last visited Feb. 20, 2012).

2. *See id.* (stating that investments are best protected by requiring disclosure of information to the public).

3. *See infra* Part V.

4. Credit Suisse Securities (USA) LLC v. Simmonds, No. 10-1261 (U.S. argued Nov. 29, 2011).

5. Securities Exchange Act of 1934 § 16(a), 15 U.S.C.A § 78p(a) (West 2010).

16(b) requires that all profits generated by the insider from the purchase or sale of such securities within a period of less than six months be disgorged back to the issuer.[6] Moreover, the Section reads: "[N]o such suit [under Section 16(b)] shall be brought more than two years after the date such profit was realized."[7] Section 16(b) relies exclusively on a private right of action by stockholders of the issuing corporation.[8] The SEC has carved out an underwriter exemption to both disclosure under 16(a) and disgorgement under 16(b), allowing underwriters to keep their profits from short-swing transactions when acting in good faith and in the ordinary course of business.[9]

In *Credit Suisse Securities*, the Supreme Court will address the applicability of equitable tolling doctrines to Section 16(b) of the Securities Exchange Act of 1934. Specifically, the Court must decide between four distinct approaches: disclosure, actual notice, discovery, and repose.[10] Because each choice represents a significant change in the balance of responsibilities between shareholders and insiders of a corporation, the Court will have to look outside the factual boundaries of the case to properly assess the policy implications of each proposed alternative.[11]

II. FACTS OF THE CASE

The 1990s saw a tremendous boom in the technology sector, generating massive speculation and tremendous opportunities for raising capital in the primary markets.[12] Technology companies took advantage of this environment by issuing hundreds of initial public offerings (IPOs).[13] In an IPO, the investment banks that form the underwriting syndicate determine the price of an IPO's shares as well as the number of shares to be issued. The banks then commit to underwriting the transaction: purchasing the entire equity issuance at a below-market price and subsequently distributing the securities to

6. § 16(b) (codified as amended at 15 U.S.C.A § 78p(b) (West 2010)).

7. *Id.*

8. *See id.* ("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 . . . .").

9. *See* 17 C.F.R. § 240.16a-7(a) (West 2011) (creating an underwriter exemption to Section 16(a)); *see also* § 240.16a(10) (applying the underwriter exemption to Section 16(b)).

10. *See infra* Part III.

11. *See infra* Part V.

12. *See* Brief for Respondent at 6–7, Credit Suisse Sec. v. Simmonds, No. 10-1261 (U.S. Sept. 26, 2011) (discussing "hot" IPOs of the dot-com era).

13. *Id.* at 7.

the public at a higher fixed price.[14] Critically, the issuer transfers the offered shares onto the underwriters' books, giving the underwriters large, though temporary, stakes in the issuers' corporations.[15]

Because underwriters' profits are determined by the spread between the initial and fixed prices, they take on the risk of low demand. In the volatile markets of the 1990s, share prices of technology IPOs would often increase exponentially in the weeks following the public offerings; investors who managed to get their hands on hot IPO shares often made tremendous returns.[16]

In March of 2000, the dot-com bubble burst and hundreds of technology stocks tanked. This prompted thousands of investors to file a class action lawsuit in connection with more than 300 IPOs.[17] Shareholders challenged Underwriters'[18] conduct under antitrust laws, basing their suit on two distinct factual claims.[19] First, the shareholders alleged that the Underwriters would initiate frenzies by entering into "laddering" arrangements—wherein investors were required to buy IPO shares at increasingly higher prices in the aftermarket in order to secure allocations of the IPOs.[20] Second, shareholders alleged that the Underwriters would receive kickbacks from investors who were allocated shares in the early stages of an offering through "tying" arrangements, or agreements to purchase different securities at later dates.[21] The Supreme Court dismissed these antitrust complaints, holding that an extension of antitrust law to the facts of the IPO litigation would infringe on the realm of securities regulation.[22]

Six years later, in 2006, Respondent Vanessa Simmonds bought shares in fifty-five of the companies subject to the earlier IPO litigation.[23] Simmonds, now a shareholder of the companies that

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14. *See id.* (explaining how underwriters buy cheap and sell high shortly after purchase).

15. *See id.* at 10 (stating that, collectively, the underwriters were beneficial owners of more than ten percent of issuer securities).

16. *Id.* at 7.

17. Brief for the United States as Amicus Curiae Supporting Neither Party at 3, *Credit Suisse Sec.*, No. 10-1261 (U.S. Aug. 25, 2011).

18. The defendants in this litigation include Credit Suisse Securities (USA) and dozens of other underwriters.

19. Credit Suisse Sec. v. Billing, 551 U.S. 264, 267 (2007).

20. *See id.* at 269–70 (noting that plaintiffs in suit were suing over "laddering" arrangements).

21. *Id.*

22. *See id.* at 285 ("We therefore conclude that the securities laws are 'clearly incompatible' with the application of the antitrust laws in this context.").

23. Brief for Petitioner at 10, *Credit Suisse Sec.*, No. 10-1261 (U.S. Aug. 18, 2011).

conducted IPOs in 1999 and 2000, brought derivative suits under a modified legal challenge based on nearly identical factual claims.[24] She alleged that the Underwriters of the IPOs were beneficial owners of more than ten percent of company securities and profited from the short-swing trading of such securities in violation of Section 16(b).[25] Moreover, Simmonds asserted that the Underwriters' alleged tying and laddering arrangements were not done in good faith and therefore were not subject to the underwriter exemption.[26] Finally, because the Underwriters failed to report these non-exempt short-swing transactions with a Section 16(a) disclosure, Simmonds claimed that Section 16(b)'s two-year statute of limitations should be subject to equitable tolling.[27] This final claim is at issue before the Supreme Court.

After Simmonds settled one case out of court, the Underwriters moved to dismiss the remaining fifty-four complaints on the ground that the claims were time-barred, having been filed more than two years after the date the profits at issue were realized.[28] The district court agreed with regard to twenty-four of the claims.[29] According to the district court, the two-year statute of limitations in Section 16(b) was not tolled because Simmonds had access to all of the information necessary to bring a claim under Section 16(b) more than two years before filing suit.[30] Therefore, the equitable tolling doctrine was inapplicable.[31] The Ninth Circuit reversed, holding that Section 16(b)'s statute of limitations is tolled until the Underwriters disclose their transactions via a filing of Section 16(a) disclosure statements.[32] To date, no such statements have been filed.[33]

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24. *See* Simmonds v. Credit Suisse Sec., 638 F.3d 1072, 1085 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3064 (U.S. June 27, 2011) (No. 10-1261) (alleging the same factual accusations of laddering, tying, and kickbacks as were alleged against underwriters in *Billing*).

25. *Id*. at 1084.

26. Brief of Appellant/Cross-Appellee at 56, *Simmonds*, 638 F.3d 1072 (No. C07-1649).

27. *Id.* at 21–23.

28. Underwriter Defendants-Appellees-Cross-Appellants' Reply at 1, *Simmonds*, 638 F.3d 1072 (No. C07-1649).

29. *In re* Section 16(b) Litig., 602 F. Supp. 2d 1202, 1218 (W.D. Wash. 2009) (dismissing the thirty remaining cases for insufficient demand).

30. *Id.* at 1217.

31. *Id.* at 1218.

32. *Simmonds*, 638 F.3d at 1096–97.

33. Brief for Respondent, *supra* note 12, at 10–11.

III. BACKGROUND LAW

Credit Suisse Securities requires the Supreme Court to determine if equitable tolling applies to Section 16(b)'s limitations period. If the Court holds that Section 16(b) contains a statute of limitations subject to equitable tolling, it will then have to determine the scope of the equitable tolling doctrine in the context of Section 16(b) litigation.[34]

Equitable tolling, a legal doctrine enumerated in *Holmberg v. Armbrecht*,[35] delays the running of the statute of limitations whenever defendants have defrauded or concealed facts essential to a plaintiff's cause of action.[36] The Supreme Court has recognized a rebuttable presumption in favor of equitable tolling where a defendant defrauds or misrepresents material facts, preventing a plaintiff from filing suit within the statutory time limit.[37] This rule derives from the maxim that a party should not be allowed to profit from its own misconduct.[38] In addition, tolling is appropriate not only in cases of affirmative misrepresentation, but also where a party's silence breaches an independent legal duty to disclose.[39]

Section 16(b) is both over-inclusive and under-inclusive.[40] On the one hand, it "imposes strict liability regardless of motive, including trades not actually based on inside information."[41] On the other hand, there is no liability for actual insider trading done over a period longer than six months.[42] This structure was not accidental nor a consequence of poor drafting. Rather, it was a purposive attempt by Congress to meet the Securities Exchange Act's stated goal of "easy

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34. *See* Brief for Petitioner, *supra* note 23, at *i* (framing the questions presented as "[w]hether the two-year time limit . . . is subject to tolling, and, if so, whether tolling continues even after the receipt of notice of facts giving rise to the action").

35. 327 U.S. 392 (1946).

36. *Id.* at 397.

37. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990).

38. *See, e.g.*, Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232–33 (1959) ("[W]e need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." (footnote omitted)).

39. *See* Chiarella v. United States, 445 U.S. 222, 230 (1980) (stating that "silence in connection with purchase or sale of securities may operate as a fraud" with "such liability . . . premised upon a duty to disclose"); *see also* Sprint Commc'ns v. FCC, 76 F.3d 1221, 1226 (D.C. Cir. 1996) ("Silence does toll the statute of limitations, however, if the defendant has an affirmative duty to disclose . . . .").

40. Dreiling v. Am. Exp. Co., 458 F.3d 942, 947 (9th Cir. 2006).

41. *Id.*

42. *Id.*

administration."[43] By providing strict bright-line rules, Congress sought to diminish problems of proof and reduce uncertainty in Section 16(b)'s application.[44] As a result, courts have been hesitant to "exceed a literal, 'mechanical' application of the statutory text."[45]

The Section's statute of limitations reads in relevant part: "Suit to recover such profit may be instituted at law or in equity . . . but no such suit shall be brought more than two years after the date such profit was realized."[46] The statute contains no reference to a plaintiff's discovery of facts.[47] However, given that courts are hesitant to exceed literal interpretations of Section 16(b)'s operative provisions, it seems plausible that they would apply such restrictive reasoning to the language of the timing provision as well. Nonetheless, this plain meaning interpretation of the provision has not prevented courts from applying equitable tolling.

The Circuits are split between three equity-based approaches to tolling of Section 16(b) claims. In *Whittaker v. Whittaker Corp.*,[48] the Ninth Circuit adopted a disclosure approach to equitable tolling.[49] The plaintiff argued that Section 16(b)'s statute of limitations should be tolled until a defendant files a Section 16(a) report.[50] The court agreed, holding that the two-year time limit did not begin to run because the insider never disclosed the covered transaction with a 16(a) report.[51] The court reasoned that Congress's goal of limiting insider trading would be circumscribed if an insider could simply avoid the effects of Section 16(b) by failing to disclose the covered transactions as required by Section 16(a).[52]

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43. Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422 (1972).

44. *Id.*

45. Gollust v. Mendell, 501 U.S. 115, 122 (1991) (quoting *Reliance Elec. Co.*, 404 U.S. at 425); *see also* Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232, 251 (1976) (refusing to interpret Section 16(b) beyond its "narrowly drawn limits"); *see also* Kern Cnty. Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 593–96 (1973) (suggesting that courts should not interpret Section 16(b) beyond its "strict terms").

46. Securities Exchange Act of 1934 § 16(a), 15 U.S.C.A § 78p(b) (West 2010).

47. *Id.*

48. 639 F.2d 516 (9th Cir. 1996).

49. *See id.* at 528–29.

50. *Id.* at 527.

51. *Id.* at 529.

52. *See id.* at 528 ("If insiders could insulate their transactions from the scrutiny of outside shareholders by failing to files 16(a) reports and waiting for the two year time limit to pass, then Congress's creation of these shareholders' derivative suits would be nullified.").

Using a different approach, the Second Circuit nevertheless came to a similar conclusion in *Litzler v. CC Investments, L.D.C.*[53] The court began its analysis by distinguishing inquiry notice from actual notice.[54] Under inquiry notice, a statute of limitations will be tolled until a reasonably diligent plaintiff has sufficient information to inquire into the potential violation.[55] A plaintiff's knowledge of his injury, therefore, would defeat equitable tolling. The *Litzler* court found, however, that Section 16 imposes an "absolute duty" of disclosure that would be strained if inquiry notice applied.[56] Shareholders are not supposed to piece together the relevant facts needed to bring a claim under Section 16(b). Instead, shareholders have a justified expectation that any information pertinent to a Section 16(b) violation would be publicly available through a Section 16(a) disclosure.[57] Therefore, the statute should be tolled until the shareholder or company gets "actual notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing."[58] Actual notice, according to the court, can only be triggered by compliance with Section 16(a).[59]

The third equity-based approach—the discovery approach—was enumerated in *Merck & Co. v. Reynolds*.[60] According to the *Merck* Court, if a defendant has misrepresented or wrongfully concealed facts essential to the plaintiff's case, the statute of limitations will be tolled until a reasonably diligent plaintiff discovers or should discover the facts that would form the basis of a claim.[61] Although the filing of a disclosure form would presumably give shareholders sufficient information to discover Section 16(b) violations, a shareholder also can be alerted to possible violations through alternative means, such as pleadings filed in a previous case. Therefore, a discovery approach dictates that Section 16(b)'s statute of limitations begins to run as

53. 362 F.3d 203 (2d Cir. 2004).

54. *Id*. at 207–08.

55. *Id.*

56. *Id.* at 208 (quoting Grossman v. Young, 72 F. Supp. 375, 378 (S.D.N.Y. 1947)).

57. *See id.* ("Section 16 compels disclosure (through a Form 4) that is so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two.").

58. *Id.*

59. *See id.* ("Such tolling should continue only until the claimant or (depending on the circumstances) the company gets actual notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing.").

60. *See* Merck & Co. v. Reynolds, 130 S. Ct. 1784, 1796 (2010) (holding that a discovery approach applies to section 10(b)).

61. *Id.* at 1789–90.

soon as shareholders should discover information that could form the basis of a short-swing claim, whether or not that information is a Section 16(a) disclosure.

The three equity-based rules described above stand in sharp contrast to the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.[62] Although the *Lampf* court acknowledged that statutes of limitations are "customarily subject to tolling,"[63]—particularly when one party is injured by the fraud of the other and remains in ignorance of her injury—the Court found sufficient evidence to override this traditional presumption in Section 10(b) of the Securities Exchange Act of 1934.[64] Instead, the Court held that the statute of limitations in Section 10(b) is a period of repose—a strict outer limit unaffected by the plaintiff's discovery of information pertinent to a potential suit.[65] A period of repose is distinguishable from a statute of limitations because it is totally inconsistent with tolling.[66] Although the *Lampf* Court did not hear arguments concerning Section 16,[67] both the majority and dissenting opinions refer to Section 16(b)'s two-year limitations period, in dicta, as a period of repose.[68]

IV. ARGUMENTS

The Supreme Court heard oral arguments from three parties—the Underwriters, Simmonds, and, writing in support of neither party, the United States. The Underwriters claim that Section 16(b) contains a period of repose not subject to tolling.[69] Simmonds, applying the disclosure approach, contends that the statute of limitations in Section 16(b) should be tolled until the filing of a Section 16(a) report.[70] The United States, arguing for the application of the discovery approach, asserts that Section 16(b)'s statute of limitations should be tolled only

62. 501 U.S. 350 (1991).

63. *Id.* at 363 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (citations omitted)).

64. *Id.*

65. Brief for Petitioner, *supra* note 23, at 16–19; *see also* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990) (finding that tolling is inconsistent with statutes of repose because "their very purpose is to set an outer limit unaffected by what the plaintiff knows").

66. *Lampf*, 501 U.S. at 363.

67. *See* Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 28 n.7 ("Section 16(b) was not at issue in Lampf . . . .").

68. *Lampf*, 501 U.S. at 360 n.5; *id.* at 375 (Kennedy, J., dissenting).

69. Brief for Petitioner, *supra* note 23, *passim*.

70. Brief for Respondent, *supra* note 12, *passim*.

until a reasonably diligent investor knows or should know about the Section 16(b) violation.[71]

A. Underwriters' Plea for Repose

The *Lampf* Court characterized Section 16(b)'s statute of limitations, in dicta, as a period of repose.[72] In fact, the majority opinion noted that the two-year time limit is a "more restrictive" period then the three-year period imposed by Section 10(b).[73] Therefore, the Underwriters argue that *Lampf* provides direct support for the proposition that equitable tolling does not apply to Section 16(b).[74] The Underwriters then turn to the language of Section 16(b), to similar provisions in the Securities Exchange Act of 1934, and to the structure of the 1934 Act to bolster their argument.[75]

The Underwriters assert that Section 16(b) contains the language of a traditional statute of repose.[76] They contend that there is no meaningful distinction between the limiting language of Section 16(b)—"[n]o such suit shall be brought more than two years after the date"— and the outer limits of two companion limitation provisions in the Exchange Act that have been characterized by the *Lampf* Court as statutes of repose.[77]

Moreover, the Underwriters claim that because Section 16(b) and the companion provisions are contemporaneously enacted provisions of the same statute, they should be interpreted in a similar fashion.[78] This cohesive reading of the provisions is supported by the policy justification underlying each of the sections. The *Lampf* Court stated that both Section 10(b) and the companion provisions were intended to "facilitate a central goal: 'to protect investors against manipulation of stock prices through regulation of transactions upon securities

71. Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, *passim*.

72. *Lampf*, 501 U.S. at 363.

73. *Id.* at 360 n.5.

74. *See* Brief for Petitioner, *supra* note 23, at 2 ("Indeed, by reference to these companion provisions, this Court already has characterized Section 16(b)'s time limit as a 'period of repose' that cannot be extended." (quoting *Lampf*, 501 U.S. at 360 n.5)).

75. *Id.* at 16, 18–21.

76. *Id.* at 16, 20–21.

77. *Id*. at 20–21. These Sections, 9(e) and 18(c) (hereafter the "companion provisions"), read in relevant part: "[N]o action shall be maintained to enforce any liability . . . unless brought . . . within three years after such violation."

78. Brief for Petitioner, *supra* note 23, at 20 (quoting *Lampf*, 501 U.S. at 359).

exchanges.'"[79] Because Section 16(b) was also implemented to protect investors against insiders' manipulation of stock prices, it should be interpreted consistently with the companion provisions.[80] Accordingly, the Underwriters argue that Section 16(b) should be construed as a statute of repose.[81]

The Petitioners then juxtapose the single structure of Section 16(b)'s statute of limitations to the two-part structure of the companion provisions' statutes of limitations.[82] Section 9 reads: "An action may be brought . . . within one year after the discovery of the facts constituting a violation and within three years after such violation."[83] This dual-structure "underscores that Congress knew perfectly well how to link a time limit to the plaintiff's 'discovery' [of pertinent facts]."[84] Nonetheless, Congress avoided adopting discovery-specific language for Section 16(b) and, instead, tied the running of the statute of limitations to the date on which short-swing profits were realized.[85]

The lack of a general discovery rule in Section 16(b) highlights another issue with Simmonds' petition for equitable relief: although discovery rules traditionally lengthen the period in which a plaintiff can bring suit, the limited discovery rules in the companion provisions *shorten* the limitations period from three years to one year.[86] This suggests that Congress intended discovery rules to act as *restrictions* on statutory time limits in the Securities Exchange Act. The Underwriters argue, therefore, that where Congress implements an explicit discovery rule to shorten a statute of limitations, a court should not read an implicit discovery rule into a neighboring section of the same statute in order to extend a limitations period.[87]

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79. *Lampf*, 501 U.S. at 360–61 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976)).

80. *See* Interpretive Release on Rules Applicable to Insider Reporting and Trading, Release No. 34-18114, 46 Fed. Reg. 48147-01, at 48147 (Oct. 1, 1981) (finding that Congress enacted Section 16 to prevent insiders from manipulating the price of company stock).

81. Brief for Petitioner, *supra* note 23, *passim*.

82. *See* Brief for Petitioner, *supra* note 23, at 19–21 ("The juxtaposition of a 'discovery' time limit with an outer time limit in Sections 9(e) and 18(c) also shows that the outer time limit of these dual-structure provisions is a period of repose that cannot be extended, regardless of when the plaintiff discovers a claim.").

83. Securities Exchange Act of 1934 § 9, 15 U.S.C.A § 78i(f) (West 2010).

84. Brief for Petitioner, *supra* note 23, at 19.

85. *Id.*

86. *Id.* at 21.

87. *Id.* at 22.

The Underwriters also note that the companion provisions involve intentional violations of securities law. Section 16(b), however, is a strict liability provision carrying no scienter requirement.[88] In fact, Section 16(b) does not prohibit insiders from engaging in short-swing transactions; it merely forces disgorgement of profits in covered transactions.[89] The Underwriters maintain that it would seem counterintuitive to assume that Congress intended to allow repose in cases of intentional fraud (as the Court had done in *Lampf*), yet deny repose to insiders who were unknowingly violating the technical requirements of Section 16(b).[90]

B. Absolute Disclosure: Simmonds' Argument for Equitable Tolling

Simmonds argues that the Underwriters' failure to disclose transactions covered under Section 16(a) is a breach of an affirmative duty of disclosure that tolls the statute of limitations.[91] Moreover, relying on both *Whittaker* and *Litzler*, Simmonds contends that the statute of limitations does not begin to run until the filing of a Section 16(a) disclosure because Congress's purpose of "curb[ing] insider trading" requires the imposition of an "absolute duty" of disclosure.[92]

1. Rebutting the Underwriters' Arguments for Repose

First, Simmonds attempts to show that the text of Section 16(b) more closely resembles a traditional statute of limitations rather than a period of repose.[93] Periods of repose often focus on the elimination of the underlying right rather than the suit's timeliness.[94] Section 16(b), however, does not address the loss of a corporation's right to short-swing profits.[95]

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88. Brief for Petitioner, *supra* note 23, at 22–23.

89. *Id.* at 23; *see also* Securities Exchange Act of 1934 § 16(b), 15 U.S.C.A § 78p(b) (West 2010).

90. Brief for Petitioner, *supra* note 23, at 23.

91. *See* Brief for Respondent, *supra* note 12, at 24–26 (implying that the absolute duty to disclose gives rise to tolling).

92. *Id.* at 23–26.

93. *Id.* at 18.

94. *Id.* For example, the statute of limitations in § 1635(f) of the Truth in Lending Act reads in relevant part that the "right of rescission shall expire three years after the date . . . ."

95. *Id.*; *see also* Donald C. Cook & Myer Feldman, *Insider Trading under the Securities Exchange Act*, 66 HARV. L. REV. 385, 413 (1953) ("The two-year statute of limitations in Section 16(b) is not a condition of the right to action. It is merely a limitation upon bringing . . . suits . . . .").

Next, Simmonds argues that the Underwriters' reliance on *Lampf* is misplaced.[96] The *Lampf* Court did not emphasize the precise wording of the relevant provisions in deciding whether Section 10(b)'s time limitation was a statute of repose. Instead, when rebutting the standard presumption against equitable tolling, the *Lampf* majority gave particular consideration to the structure of the companion provisions: "[T]he equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure."[97] According to the Court, the inner one-year limit already provides for the discovery of facts by the plaintiff, thereby making discovery-based tolling superfluous.[98] As a result, the three-year term serves as a strict outer limit—as a period of repose not subject to tolling—only because of its relationship to the one-year inner limit.[99] The companion provisions already provide for the application of a discovery rule, the three-year time limit does not need to be extended in order to afford additional time for discovery.[100] Section 16(b) lacks this dual structure.[101] Therefore, the key to the majority's reasoning in *Lampf* for overriding the traditional presumption for equitable tolling is not present in this case.[102]

More importantly, Section 16(b) was never at issue in *Lampf*; the characterization of Section 16(b) as a period of repose is merely dicta. In fact, *Lampf* explicitly rejected any analogy between Section 10(b) and Section 16(b), refusing to adopt Section 16(b)'s time limitation because of its differing focus and alternative means of punishment.[103] Therefore, the Court has implicitly acknowledged that Section 16(b) should be evaluated on its own terms.

Finally, Simmonds claims that the legislative history of Section 16 supports a narrow interpretation of the provision. Congress

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96. Brief for Respondent, *supra* note 12, at 28.

97. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991).

98. *Id.*

99. *Id.*

100. Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 26–27.

101. *Id.* at 27; *see also* Securities Exchange Act of 1934 § 16(b), 15 U.S.C.A § 78p(b) (West 2010).

102. *See* Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 27 (arguing that the *Lampf* Court "did not suggest that the presumption for equitable tolling is generally inapplicable to limitations periods contained in the securities law").

103. Brief for Respondent, *supra* note 12, at 28; *see also Lampf*, 501 U.S. at 360 n.5 ("Because that provision [Section 16(b)] requires the disgorgement of unlawful profits and differs in focus from § 10(b) and from the other express causes of action, we do not find § 16(b) to be an appropriate source from which to borrow a limitations period here.").

specifically rejected a repose approach when drafting Section 16.[104] In the first draft of the House bill, Congress considered a dual-structure approach similar to that of the companion provisions, drafting the following language: "No such suit shall be brought more than six months after such profit was realized if the facts upon which such suit was based were disclosed . . . or more than three years after such profit was realized if the facts were not disclosed."[105] This language was subsequently deleted.[106] "[F]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silento* to enact statutory language that it has earlier discarded."[107] In fact, rather than foreclosing the application of equitable remedies to Section 16(b), Congress specifically reinforced the presumption of equitable tolling by explicitly providing for the operation of equitable remedies: suit to recover short-swing profits "may be instituted at law or in *equity*."[108]

2. A Conjunctive Reading of Section 16

Simmonds further argues that Section 16(b) should be interpreted in conjunction with Section 16(a).[109] Such an interpretation would provide the necessary link between the cause of action provided by Section 16(b) and the disclosure of the covered transaction under Section 16(a). Because the cause of action depends on the disclosure, the running of the statute of limitations should also depend on the disclosure of the covered transaction.[110]

To prove this connection, Simmonds asserts that Congress "grammatically" linked Section 16(b)'s time limit to its counterpart provision, Section 16(a):[111] "[N]o such suit [under Section 16(b)] shall

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104. Brief for Respondent, *supra* note 12, at 29–30.

105. *Id.* at 29 (quoting H.R. COMM. ON INTERSTATE & FOREIGN COMMERCE, 73RD CONG., SECURITIES EXCHANGE BILL 45 (Subcomm. Print Apr. 18, 1934)).

106. *See* H.R. COMM. ON INTERSTATE & FOREIGN COMMERCE, 73RD CONG., SECURITIES EXCHANGE BILL 45 (Subcomm. Print Apr. 26, 1934).

107. Brief for Respondent, *supra* note 12, at 30–31 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987)).

108. Securities Exchange Act of 1934 § 16(b), 15 U.S.C.A § 78p(b) (West 2010) (emphasis added).

109. *See* Brief for Respondent, *supra* note 12, at 5 ("[Section 16(a) reports] 'are an integral part of the context of § 16 within which § 16(b) must be read.'" (quoting Whittaker v. Whittaker Corp., 639 F.2d 516, 528 (9th Cir. 1981))).

110. *See id.* at 22 ("Underwriters' no-tolling construction ignores [Section 16(a)'s disclosure requirement].").

111. *Id.* at 20 (quoting ARNOLD JACOBS, SECTION 16 OF THE SECURITIES EXCHANGE ACT § 1:1 (2012)).

be brought more than two years after the date *such profit* was realized."[112] "Such profit" refers to profits realized by the "beneficial owner, director, officer" defined in Section 16(a)(1).[113] Under Section 16(a)(3), such statutory insiders must disclose their purchase or sale of "equity securities of such issuer of which the filing person is the beneficial owner."[114] Therefore, the operation of Section 16(b)'s statute of limitations presumes that Section 16(a) profits will be disclosed.[115]

Furthermore, Simmonds argues that the underlying rationale for Section 16 would be thwarted if insiders could escape liability under Section 16(b) by not properly reporting transactions under Section 16(a).[116] Section 16(b) works only by imposing an "absolute duty" of disclosure upon insiders subject to Section 16(a).[117] A failure to disclose a transaction under Section 16(a) would, therefore, effectively insulate insiders from Section 16(b) liability.

Simmonds supports this absolute duty requirement by turning to the legislative history of the Securities Exchange Act of 1934. When drafting Section 16(b), Congress was concerned with correcting the asymmetry of information between insiders and other shareholders.[118] The legislative history details several incidents where insiders with advanced knowledge of material information bought and sold securities of the issuer—of which they were a beneficial owner—for purposes of personal gain.[119] Some insiders went so far as to manipulate the market price of their own company's securities in order to obtain short-swing profits.[120] Section 16, however, was not meant to punish insider short-swing transactions.[121] Instead, Congress created a prophylactic incentive structure intended to prevent future

112. § 16(b) (codified as amended at 15 U.S.C.A. § 78p(b) (West 2010)) (emphasis added).

113. Brief for Respondent, *supra* note 12, at 21.

114. § 16(a)(3)(A) (codified as amended at 15 U.S.C.A. § 78p(a)(3)(A) (West 2010)).

115. Brief for Respondent, *supra* note 12, at 21.

116. *Id.* at 45–46; Whittaker v. Whittaker Corp., 639 F.2d 516, 528 (9th Cir. 1981).

117. *See* Brief for Respondent, *supra* note 12, at 26; Litzler v. CC Invs., L.D.C., 362 F.3d 203, 208 (2d Cir. 2004).

118. *See* Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232, 243 (1976) ("Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public.").

119. Interpretive Release on Rules Applicable to Insider Reporting and Trading, 46 Fed. Reg. 48147-01, at 48147 (Oct. 1, 1981) (codified at 17 C.F.R. § 241).

120. *Id.*

121. *See* Whiting v. Dow Chem. Co., 523 F.2d 680, 689 (2d Cir. 1975) ("[Section 16(b)] is meant to prevent, rather than to cure what has already happened.").

opportunistic behavior.[122] The two subsections of Section 16 depend on one another to properly implement this incentive scheme.[123]

Section 16(a) requires directors, officers, and stockholders who own more than ten percent of a company's stock to disclose the amount of equity security that they currently hold, as well as any change in ownership of company stock within two business days of their purchase or sale of such stock.[124] Such persons lose some of their time-sensitive informational advantage by revealing to the market, within a period of two days, their reassessment of the value of their own company.[125] Consequently, Section 16(a) acts as a deterrent to insiders' potential abuses by allowing market mechanisms to limit the effect of insiders' opportunistic behavior.

Employing similar deterrent effects, Section 16(b) allows shareholders to force disgorgement of any beneficiary's profits made from the purchase or sale of the beneficiary company's security within a period of six months.[126] This is a strict liability provision.[127] The disgorgement remedy of Section 16(b) is prophylactic: it does not punish past insider short-swing transactions. Instead, it is intended to prevent future manipulative trading by taking away any incentive to manipulate share prices.[128] A prophylactic scheme, by definition, can only work effectively if insiders are properly disincentivized from violating the relevant provision: "[I]f s 16(b) is to have the 'optimum prophylactic effect' which its architects intended, insiders must not be permitted so easily to circumvent its broad mandate."[129]

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122. *Id.*; Blau v. Lamb, 363 F.2d 507, 516–17 (2d Cir. 1966) (finding that Section 16(b) acts as a deterrent).

123. *See* Litzler v. CC Invs., L.D.C., 362 F.3d 203, 208 (2d Cir. 2004) ("The prophylaxis of Section 16 works by imposing an 'absolute duty' of disclosure upon insiders . . . ." (quoting Grossman v. Young, 72 F. Supp. 375, 378 (S.D.N.Y. 1947))).

124. Securities Exchange Act of 1934 § 16(a), 15 U.S.C.A § 78p(a) (West 2010).

125. *See* Morales v. Quintel Entertainment, Inc., 249 F.3d 115, 122 (2d Cir. 2001) (finding that the purpose of Section 16 is to deter insiders from taking advantage of confidential information).

126. § 16(b) (codified as amended at 15 U.S.C.A. § 78p(b) (West 2010)).

127. *See* Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422 (1972) ("The objective standard of Section 16(b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation.").

128. *See* Whiting v. Dow Chem. Co., 523 F.2d 680, 689 (2d Cir. 1975) ("In so interpreting 'beneficial owner' we are not 'adding' to the prophylactic effect Congress itself clearly prescribed in [§] 16(b).").

129. *Reliance Elec. Co.*, 404 U.S. at 432 (Douglas, J., dissenting).

This prophylactic scheme, claims Simmonds, must ensure that insiders are not afforded easy opportunities to evade the law.[130] It must therefore provide sufficient deterrents against the violation of the relevant provision. Section 16(b) provides this deterrent through a nearly automatic application and "disclosure . . . that is so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two."[131] It requires a bright-line determination of insider short-swing trading, based on strict liability, that is both over-inclusive and under-inclusive.[132] Given the difficulties involved in uncovering evidence of insider trading, Section 16(b) can only ensure the adequate protection of shareholders—and by negative implication, adequate deterrence of insiders—by providing for an "absolute duty" to file Section 16(a) reports. To do so would tie the running of the statute of limitations to the disclosure of the covered transaction.[133] Unless an "absolute duty" is imposed, Simmonds asserts that insiders will be able to circumvent the application of Section 16(b) by failing to disclose their short-swing transactions and then watching the statute of limitations run.[134]

Congress's intention to impose an "absolute duty" of disclosure explains why it implemented an exclusively private enforcement

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130. *See* Brief for Respondent, *supra* note 12, at 26.

131. Litzler v. CC Invs., L.D.C., 362 F.3d 203, 208 (2d Cir. 2004); *see also* Blau v. Lamb, 363 F.2d 507, 516 (2d Cir. 1966) ("[Section 16(b)'s] success as a deterrent was rooted in its simplicity and relatively automatic operation . . . .").

132. *See* Dreiling v. Am. Exp. Co., 458 F.3d 942, 947 (9th Cir. 2006) ("The statute imposes strict liability on insiders only for 'shortswing' trades . . . . Courts have recognized that § 16(b) is a blunt instrument, at once both over- and under-inclusive.").

133. *See Litzler*, 363 F.3d at 208 ("The prophylaxis of Section 16 . . . would be impaired if the tolling triggered by non-compliance was ended or defeated by mere inquiry notice, or by circumstances in which a person would or should have realized the non-compliance, or by the ability of a shareholder or company to piece together the substance of a Form 4 from disparate sources of information."); *see also* Grossman v. Young, 72 F. Supp. 375, 378 (S.D.N.Y. 1947) ("The short space of time within which the action must be brought under Section 16(b) is intelligible only when read in the context of an absolute duty to make prompt and frequent reports.").

134. *See* Brief for Respondent, *supra* note 12, at 24–26; *see also* Whittaker v. Whittaker Corp., 639 F.2d 516, 528 (9th Cir. 1981); Blau v. Albert, 157 F. Supp. 816, 819 (S.D.N.Y. 1957) ("[I]t would be a simple matter for the unscrupulous to avoid the salutary effect of Section 16(b) which provides a remedy for the recovery of short term profits, simply by failing to file monthly reports in violation of subdivision (a) and thereby concealing from prospective plaintiffs the information which they would need to adequately protect their interests."); Marc I. Steinberg & Daryl L. Landsdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 NOTRE DAME L. REV. 33, 59 (1992) ("To permit an insider to violate section 16(a) by neglecting its filing obligation and thereby avoid section 16(b) liability . . . conflicts with the congressional objective of deterring insider abuse . . . .").

mechanism for Section 16(b)[135] while expressly creating a public enforcement mechanism for Section 16(a).[136] Under the intended incentive scheme of an "absolute duty" to disclose, the government guarantees the disclosure of all necessary information under Section 16(a),[137] leaving shareholders holding the reins only with regard to the enforcement mechanism of Section 16(b). Because all shareholders are presumed to have access to information regarding insider's short-swing profits,[138] the enforcement mechanism becomes so easy for a private individual to administer that there is no need for the unnecessary expenditure of public resources. Only if shareholders are entitled to rely on an expectation that all inside transactions are public information will the court effectuate Congress's intent and give investors confidence that they have sufficient protection under the current legal regime. Adequate protection can only be achieved by enforcing the principle of absolute disclosure.

C. Limiting Principles: Arguments for the Application of a Discovery Rule

Arguing for neither side, the United States Government occupies a middle ground between the positions of Simmonds and the Underwriters. Analogizing to arguments advanced by the Supreme Court in *Merck & Co. v. Reynolds*,[139] the United States maintains that equity does not necessarily require tolling of the limitations period until after the filing of a Section 16(a) report.[140] Although such a filing would start the running of the statute of limitations, it is not the only triggering scenario.[141] Rather, the equitable tolling exemption should apply in cases of fraud or concealment until the "litigant first knows or with due diligence should know facts that will form the basis for an action."[142] Section 16(b)'s statute of limitations, therefore, begins to run whenever a reasonable plaintiff should discover the facts necessary to bring a short-swing claim.[143]

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135. Securities Exchange Act of 1934 § 16(b), 15 U.S.C.A § 78p(b) (West 2010).

136. *Id.* at § 16(a) (codified as amended at 15 U.S.C.A. § 78p(a) (West 2010)).

137. *See* Cook & Feldman, *supra* note 95, at 414 (arguing that if there is no disclosure under Section 16(a), shareholders are not charged with adequate notice of the transaction).

138. *Id.*

139. 130 S. Ct. 1784 (2010).

140. Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 19–24.

141. *Id.* at 20–21.

142. *Id.* at 19 (quoting *Merck*, 130 S. Ct. at 1794).

143. *Id.*

Equitable tolling is an exception to the general limitations rule, applying whenever a defendant's fraudulent conduct prevents a plaintiff from "even *knowing* that he or she had been defrauded."[144] Only where the plaintiff—without any want of diligence on his part—remains in ignorance of the fraud committed upon him, does the statute of limitations continue to be tolled. If, on the other hand, the plaintiff knows of the defendant's activities and sleeps on his rights, he should not be permitted to bring suit.[145] The United States argues that the appellate court's application of the *Whittaker* standard (that tolling does not begin to run until the filing of a Section 16(a) disclosure) is therefore inconsistent with the correct background rule.[146] Instead, the appellate court should have determined whether Simmonds actually discovered, or whether a reasonable security holder should have discovered, the facts underlying the short-swing claim.[147]

V. ANALYSIS

Application of equitable tolling rules in this case will require the Supreme Court to carefully balance the rights and responsibilities of shareholders and insiders. The Underwriters' argument presents significant problems in this regard. A repose approach would interpret Section 16(b) narrowly, conforming to judicial precedent favoring literal interpretations of strict liability provisions.[148] Congress's imposition of strict liability, however, was intended to "squeeze all possible profits out of a stock transactions [*sic*], and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty."[149] Allowing the two-year limitations period to run when a shareholder does not or should not know of the

144. *Merck*, 130 S. Ct. at 1793.

145. Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 21–22.

146. *Id.* at 21.

147. Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 21; *see also Merck*, 130 S. Ct. at 1798 (holding that the limitations period begins to run when the plaintiff discovers, or when a reasonably diligent plaintiff would have discovered, the facts constituting the violation).

148. *See, e.g.*, Gollust v. Mendel, 501 U.S. 115, 122 (1991). Because Section 16(b) imposes strict liability without fault, courts are reluctant to extend the scope of Section 16(b) liability, even in situations that would fall within the evils that Congress attempted to curb.

149. *See* Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir. 1943) (assuming this to be Congress's intention).

covered transaction would defeat Section 16(b)'s core prophylactic purpose by allowing the statute of limitations to run in cases of blatant fraud.[150] Moreover, a repose approach would task shareholders with actively investigating all corporate insiders, or risk losing their right to bring suit in federal court.

A disclosure or actual notice rule lacks the flaws of the repose approach and reaffirms the bond between the two subsections of Section 16.[151] A disclosure or actual notice rule would effectuate the prophylactic nature of the statute and ensure that covered insider short-swing transactions "*will be* discovered without any investigation other than the putting together of two and two."[152] Disclosure or actual notice would create a strict, mechanical, and bright-line statute of limitations that would not begin to run until the filing of a Section 16(a) disclosure.

Such an approach, however, greatly skews the proper balance of responsibilities between insiders and shareholders—between disclosure and investigation—shifting too much responsibility onto the former. When debating statutes of limitations in the Securities Exchange Act, Congress worried that "lingering liabilities would disrupt normal business and facilitate false claims."[153] Statutes of limitation are intended to limit the period of liability for old transactions, preventing a Sword of Damocles from indefinitely hanging over a potential wrongdoer's head.[154] Both disclosure and actual notice approaches create exactly this kind of indefinite liability.[155] If insiders can be held liable decades after the completion of the covered transaction, there is a risk of significant chilling effects that would deter individuals from serving on boards of directors.[156] In order to ameliorate the effects of this harsh rule, policy considerations dictate that shareholders, though not required to thoroughly

150. Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 30.

151. *See* Brief for Respondent, *supra* note 12, at 4–6 (arguing that Section 16(b) requires enforcement requires Section 16(a) disclosure).

152. Litzler v. CC Invs., L.D.C., 362 F.3d 203, 208 (2d Cir. 2004).

153. Ferguson v. Roberts, 11 F.3d 696, 705 (7th Cir. 1993).

154. *Id.*

155. *See In re* Section 16(b) Litig., 602 F. Supp. 2d 1202, 1218 (W.D. Wash. 2009) (finding that Simmonds' theory of liability provided no demarcated boundaries, nor did it provide any end date of liability).

156. *See* Brief of Chamber of Com. of the U.S. and Sec. Industr. and Fin. Markets Ass'n as Amici Curiae Supporting Petitioners at 11–12, Credit Suisse Sec. v. Simmonds, No. 10-1261 (U.S. Aug. 25, 2011) (noting that Senator Kean describes indefinite liability as "blackmail").

investigate possible infringements of Section 16(b), should at least be expected to avail themselves of public information.

Where all relevant information about covered transactions has become public, there are no practical justifications for allowing the continued tolling of a statute of limitations. Accordingly, adopting a discovery rule instead of a disclosure rule will not place an onerous burden on investors. Under the discovery approach, failure to disclose a Section 16 transaction will toll the statute of limitation: the purposeful concealment of the covered transaction, preventing a shareholder from discovering the short-swing profit, clearly falls within the ambit of *Holmberg v. Ambrecht*'s discovery rule.[157] In the present case, however, where shareholders had access to all facts necessary to constitute a Section 16(b) violation at least five years before the filing their claim, insiders should be entitled to expect a certain level of repose.[158]

This case highlights that a bright-line disclosure rule is too blunt an instrument for determining when a statute of limitations should begin to run. Rather, courts should determine whether a reasonable shareholder, through reasonable diligence, could have discovered the information needed to bring suit.[159] This discovery rule will best balance the interests of all parties involved; the markets will have confidence that there is sufficient disclosure of insider trading, insiders will not fear unlimited liability, and plaintiffs will have sufficient time to uncover the facts necessary to bring their claims to court.

VI. CONCLUSION

In sum, the facts of this case illustrate that investors will still be able to rely on the sufficiency of an insider's disclosures without a judicially imposed "absolute duty" to disclose. Therefore, the Court should adopt the discovery rule, reversing the Ninth Circuit and barring all twenty-four complaints on the ground that they were brought more than two years after the date that a reasonably diligent

157. Brief for the United States as Amicus Curiae Supporting Neither Party, *supra* note 17, at 7–8; *see also* Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (holding that equity tolls a statute when a defendant has concealed facts essential to the plaintiff's claim).

158. *See* Brief for the United States as Amicus Curiae Supporting Neither Party, note 17, at 7–8 (arguing that the statute of limitations should begin to run when information has come to light in ways other than through a section 16(a) disclosure).

159. *Id.*

shareholder discovered or should have discovered the facts that would form the basis of a Section 16(b) short-swing claim.