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## Supreme Court Rejects Argument That Section 16(b) Claims Based on “Short Swing” Trades Are Tolloed Until Filing of a Section 16(a) Statement

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Yesterday, in *Credit Suisse Securities (USA) LLC v. Simmonds*, No. 10-1261,<sup>1</sup> the United States Supreme Court unanimously reversed a Ninth Circuit decision which had held that the statutory two-year limitations period to file suits seeking disgorgement of “short-swing” profits from statutory corporate insiders under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is tolled until the disclosure statement required by Section 16(a) is filed. The Court was equally divided 4-4, however, as to whether Section 16(b) establishes a period of repose that is not subject to tolling. Assuming, without deciding, that some form of tolling may apply to Section 16(b) claims, the Court remanded the case for consideration of whether traditional rules of equitable tolling would allow tolling of the limitations period in this case. The Court also rejected the Second Circuit’s rule that Section 16(b)’s limitations period is tolled until the plaintiff has actual notice that a corporate insider has realized specific short-swing profits.

### CASE BACKGROUND

In 2007, Plaintiff Vanessa Simmonds brought suit under Section 16(b) to recoup profits realized by investment banks (the “underwriters”) through “short-swing” trades between 1999 and 2000 made in connection with the initial public offerings (“IPOs”) by fifty-four issuers. The district court granted the underwriters’ motions to dismiss the complaints because “all of the facts giving rise to Ms. Simmond’s complaints against the [u]nderwriter [d]efendants were known to the shareholders of the [i]ssuer [d]efendants for at least five years before these cases were filed.” *In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1217 (W.D. Wash. 2009). The district court based its decision on the fact that the Section 16(b) claims asserted in the *Simmonds* lawsuits, which were commenced in 2007, were based on the same allegations that had formed the basis for the highly publicized claims in *In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003), and *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), which had been filed in 2001 and actively litigated thereafter.

On appeal, the Ninth Circuit reversed the decision of the district court, relying on its prior decision in *Whittaker v. Whittaker*, 639 F.2d 516 (9th Cir. 1981), which held that the

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<sup>1</sup> Simpson Thacher & Bartlett LLP represented certain of the Petitioners before the Supreme Court in *Simmonds* and in related proceedings in other courts.

two-year limitations period under Section 16(b) is tolled until the insider has disclosed the transactions on the required Section 16(a) reports. Rejecting the underwriters' attempts to distinguish *Whittaker*, the Ninth Circuit ruled that the Section 16(b) limitations period "is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." *Simmonds v. Credit Suisse Sec. (USA) LLC*, 638 F.3d 1072, 1095 (9th Cir. 2011).

Before the Supreme Court, the Underwriter Petitioners argued that, in accordance with the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991), the two-year limitations period in the statute is "best read as a period of repose that can't be extended at all." *Simmonds* asked the Supreme Court to affirm the Ninth Circuit's rule that tolling ends only upon compliance with the disclosure requirements in Section 16(a). The United States, appearing as *amicus curiae*, contended that Section 16(b)'s two-year limitations period is equitably tolled until a reasonably diligent security holder knows or should know the facts underlying his claim but agreed with the Underwriter Petitioners in opposing the *Whittaker* rule requiring that a defendant must have filed a Section 16(a) disclosure before the limitations period begins to run.

Chief Justice Roberts recused himself from the consideration and decision of the case.

#### SUMMARY OF THE DECISION

In a unanimous but narrow opinion written by Justice Scalia, the Supreme Court rejected the Ninth Circuit's *Whittaker* rule and held that Section 16(b)'s two-year limitations period is not tolled until the disclosure statement required by Section 16(a) is filed. The Court rooted its decision in the plain language of the statute, reasoning: "Congress could have very easily provided that 'no such suit shall be brought more than two years after the filing of a statement under subsection (a)(2)(C).' But it did not." According to the Court, "[t]he text of §16 simply does not support the *Whittaker* rule." Rather, the statute plainly provides that "[t]he 2-year clock starts from 'the date such [short-swing] profit was realized.'"

In the absence of Chief Justice Roberts, the Court divided 4-4 whether Section 16(b)'s limitations period is a statute of repose for which there can be no equitable tolling. However, the Court unanimously ruled that, even if the provision is treated as a statute of limitations that is subject to ordinary equitable tolling, traditional principles of equitable tolling for fraudulent concealment were assumed to apply. Under these principles, a litigant must establish two elements: first, "that he has been pursuing his rights diligently" and, second, "that some extraordinary circumstances stood in his way." Equitable tolling would continue only until the fraudulently concealed facts "are, or should have been, discovered by the" litigant, at which point the limitations period would begin to run. The Court concluded that allowing tolling to continue beyond that point—for example, until a section 16(a) statement is filed—"would quite certainly be inequitable and inconsistent with the general purpose of statutes of limitations: 'to protect defendants against stale or unduly delayed claims.'" The Court also rejected the Second Circuit's rule in *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203 (2d Cir. 2004), that tolling continues until a Section 16(b) plaintiff "gets actual notice that a person subject to Section 16(b) has realized specific short-swing profits that are worth pursuing," on the

"The text of §16 simply does not support the *Whittaker* rule."

- Opinion of the Court

"Allowing tolling to continue beyond the point at which a §16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be inequitable and inconsistent with the general purpose of statutes of limitations . . . ."

- Opinion of the Court

grounds that it, too, was inconsistent with principles of equitable tolling. The Court therefore “remand[ed] for the lower courts to consider how the usual rules of equitable tolling apply to the facts of this case.”

#### IMPLICATIONS

In vacating the Ninth Circuit’s decision, the Supreme Court’s holding calls into question the viability of Simmonds’ Section 16(b) claims, as well as others in similar litigations. Although the Court instructed the lower courts to consider Simmonds’ claims in light of traditional equitable tolling principles, the district court already found that all facts on which the complaints were based were known to Simmonds for at least five years before the complaints were filed.

More generally, as a result of the recusal of Chief Justice Roberts, the Court was unable to reach a decision on the important question of whether Section 16(b) claims are subject to a two-year statute of repose. Until the Supreme Court resolves this issue, defendants seeking to dismiss Section 16(b) claims as time-barred should be prepared to argue that the plaintiffs brought suit more than two years after the date they knew or should have known of the facts underlying the claims. Although lacking the clarity and finality of a firm two-year repose period, the Court’s decision limits the ability of plaintiffs to bring stale Section 16(b) claims as compared with the Ninth Circuit’s prior rule in *Whittaker* and the Second Circuit’s prior rule in *Litzler*.

Simpson Thacher acted as counsel for JP Morgan Securities, Inc. and Bear Stearns & Co., Inc. in the Supreme Court as well as before the Ninth Circuit and district court.

For further information about this decision, please feel free to contact members of the Firm's Litigation and Government Investigations Groups, including:

**New York City:**

Bruce Angiolillo  
212-455-3735  
[bangiolillo@stblaw.com](mailto:bangiolillo@stblaw.com)

Paul Curnin  
212-455-2519  
[pcurnin@stblaw.com](mailto:pcurnin@stblaw.com)

Michael Garvey  
212-455-7358  
[mgarvey@stblaw.com](mailto:mgarvey@stblaw.com)

Paul Gluckow  
212-455-2653  
[pgluckow@stblaw.com](mailto:pgluckow@stblaw.com)

Nicholas Goldin  
212-455-3685  
[ngoldin@stblaw.com](mailto:ngoldin@stblaw.com)

David Ichel  
212-455-2563  
[dichel@stblaw.com](mailto:dichel@stblaw.com)

Peter Kazanoff  
212-455-3525  
[pkazanoff@stblaw.com](mailto:pkazanoff@stblaw.com)

Joshua A. Levine  
212-455-7694  
[jlevine@stblaw.com](mailto:jlevine@stblaw.com)

Linda Martin  
212-455-7722  
[lmartin@stblaw.com](mailto:lmartin@stblaw.com)

Mary Elizabeth McGarry  
212-455-2574  
[mmcgarry@stblaw.com](mailto:mmcgarry@stblaw.com)

Joseph McLaughlin  
212-455-3242  
[jmclaughlin@stblaw.com](mailto:jmclaughlin@stblaw.com)

Lynn Neuner  
212-455-2696  
[lneuner@stblaw.com](mailto:lneuner@stblaw.com)

Barry Ostrager  
212-455-2655  
[bostrager@stblaw.com](mailto:bostrager@stblaw.com)

Thomas Rice  
212-455-3040  
[trice@stblaw.com](mailto:trice@stblaw.com)

Mark Stein  
212-455-2310  
[mstein@stblaw.com](mailto:mstein@stblaw.com)

Mary Kay Vyskocil  
212-455-3093  
[mvyskocil@stblaw.com](mailto:mvyskocil@stblaw.com)

George Wang  
212-455-2228  
[gwang@stblaw.com](mailto:gwang@stblaw.com)

Jonathan Youngwood  
212-455-3539  
[jyoungwood@stblaw.com](mailto:jyoungwood@stblaw.com)

**Washington D.C.:**

Peter Bresnan  
202-636-5569  
[pbresnan@stblaw.com](mailto:pbresnan@stblaw.com)

Cheryl Scarboro  
202-636-5529  
[cscarboro@stblaw.com](mailto:cscarboro@stblaw.com)

Peter Thomas  
202-636-5535  
[pthomas@stblaw.com](mailto:pthomas@stblaw.com)

**Palo Alto:**

Alexis Coll-Very  
650-251-5201  
[acoll-very@stblaw.com](mailto:acoll-very@stblaw.com)

James Kreissman  
650-251-5080  
[jkreissman@stblaw.com](mailto:jkreissman@stblaw.com)

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## UNITED STATES

### **New York**

425 Lexington Avenue  
New York, NY 10017  
+1-212-455-2000

### **Houston**

2 Houston Center  
909 Fannin Street  
Houston, TX 77010  
+1-713-821-5650

### **Los Angeles**

1999 Avenue of the Stars  
Los Angeles, CA 90067  
+1-310-407-7500

### **Palo Alto**

2550 Hanover Street  
Palo Alto, CA 94304  
+1-650-251-5000

### **Washington, D.C.**

1155 F Street, N.W.  
Washington, D.C. 20004  
+1-202-636-5500

## EUROPE

### **London**

CityPoint  
One Ropemaker Street  
London EC2Y 9HU  
England  
+44-(0)20-7275-6500

## ASIA

### **Beijing**

3919 China World Tower  
1 Jian Guo Men Wai Avenue  
Beijing 100004  
China  
+86-10-5965-2999

### **Hong Kong**

ICBC Tower  
3 Garden Road, Central  
Hong Kong  
+852-2514-7600

### **Tokyo**

Ark Mori Building  
12-32, Akasaka 1-Chome  
Minato-Ku, Tokyo 107-6037  
Japan  
+81-3-5562-6200

## SOUTH AMERICA

### **São Paulo**

Av. Presidente Juscelino Kubitschek, 1455  
São Paulo, SP 04543-011  
Brazil  
+55-11-3546-1000