IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35710

THOMAS R. DREILING, on behalf of
INFOSPACE, INC.,

Plaintiff-Appellee,

v.

NAVEEN JAIN and
ANURADHA JAIN, husband and wife and their marital community,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF REVERSAL AND OF POSITIONS THAT FAVOR THE DEFENDANTS - APPELLANTS

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission, the agency responsible for the administration and enforcement of the federal securities laws, submits this brief as amicus curiae to address important legal issues relating to the "short-swing" trading

provision in Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b). The objective of Section 16(b) is to deter corporate insiders from trading in their companies' securities on the basis of inside information to which they have access by virtue of their positions. Congress viewed short-swing trading -- purchases and sales occurring within a period of less than six months -- as a type of trading that posed a particular risk of misuse of inside information. Therefore, it provided in Section 16(b) that any profits realized by the insider from such trading shall inure to and be recoverable by the issuer. Although Section 16(b) actions are brought only by issuers and their shareholders, and not by the Commission, the Commission has an interest in assuring that Section 16(b) is properly construed.

INTRODUCTION

In this shareholder's action brought under Section 16(b) of the Exchange Act on behalf of an issuer against a statutory insider to recover short-swing profits allegedly realized from purchases and sales of the company's securities, the district court entered a $247,122,712 judgment in favor of the plaintiff ($202,551,696 in profits and $44,571,016 in prejudgment interest). The relevant defendants, a statutory insider and his wife, are alleged to have taken stock of the issuer from three trusts established for the benefit of their children in violation of the terms of the trusts and for no consideration. They also are alleged to have sold stock of the issuer within six months of their acquisitions from the trusts. The district court held that

the defendants' acquisitions, for no consideration, constituted "purchases" under Section 16(b). *Dreiling v. Kellett,* 281 F. Supp. 2d 1215 (W.D. Wash. May 14, 2003). And because the defendants paid nothing for the stock, the court held that the purchase price was zero. Having so found, the court determined that the profits recoverable under Section 16(b) were the total amount of the proceeds from the defendants' sales of the stock. *Dreiling v. Jain,* 281 F. Supp. 2d 1234 (W.D. Wash. Aug. 22, 2003).

In the Commission's view, the district court erred by assigning a purchase price of zero for the shares of stock. In so doing, the court failed to recognize that when the defendants acquired the shares from the trusts, they simultaneously incurred an offsetting obligation – an obligation to return the shares to the trusts. In light of this obligation, any gains due to fluctuation in the value or market price of the shares inured to the trusts and not the defendants. To the extent that an insider acquires securities subject to an obligation to return them, and in fact performs that obligation before a shareholder demand for suit is made, he does not "realize" any "profits" within the meaning of Section 16(b).

Even if the Court does not agree that the obligation to return the shares eliminated the potential for defendants to realize any profit under Section 16(b), defendants should be permitted to deduct from the proceeds of their sales the market value of the shares at the time of their acquisition. This amount, at a minimum, was

owed to the trusts and should be imputed as the "purchase price" of defendants' shares. Further, if the first alleged acquisition of stock here was a "purchase," and the defendants would otherwise be subject to liability for profits under Section 16(b), they are entitled to the exemption from Section 16(b) liability provided by Commission Rule 16a-9, 17 C.F.R. 240.16a-9, for their later acquisition of stock split shares derived from the stock acquired in the first purchase. 1/

If the Court concurs in the view that defendants did not realize any "profits" under Section 16(b), it need not address the question whether their acquisitions of stock from the trusts were purchases, and we urge it not to reach that issue. Should the Court nevertheless determine to address whether the acquisitions were purchases, the Court should take into account the potential consequences that its resolution of the issue might have under provisions other than Section 16(b). The statutory definition of "purchase" (Section 3(a)(13), 15 U.S.C. 78c(a)(13)) is applicable to the entire Act, including the antifraud provisions in Section 10(b), 15 U.S.C. 78j(b). The Commission is concerned that, if the Court in this Section 16(b) case holds that a purchase requires consideration, it may be difficult to limit such a holding to Section

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1/ The Commission does not take any position on other legal issues presented by the parties, and it takes no position on factual disputes. Nor does the Commission, in expressing legal positions that would result in reversal of the judgment obtained by the plaintiff, endorse the alleged conduct of the defendants in this case or any other matter. The Commission's only interest is in the proper construction of the federal securities laws.

16(b). *See Gustafson v. Alloyd Company, Inc.,* 513 U.S. 561, 570 (1995) (holding that the term "prospectus" has the same meaning throughout the Securities Act). The Commission has traditionally taken a broad view of the term "purchase" in the context of Section 10(b) and does not consider the term limited, in that context, to situations where consideration is exchanged. Indeed, the Second Circuit has held that, for purposes of Section 10(b), a taking of securities for no consideration can constitute a purchase. *See International Controls Corp. v. Vesco,* 490 F.2d 1334, 1343-44 (2d Cir. 1974).

BACKGROUND

1. Facts 2/

Thomas R. Dreiling, a shareholder of InfoSpace, Inc. ("InfoSpace"), brought this shareholders' action in September, 2001, on behalf of InfoSpace against Naveen Jain, a founder and former CEO of InfoSpace, and Anuradha Jain, Naveen Jain's wife, alleging that they engaged in short-swing trading. 3/ Plaintiff seeks recovery of short-swing profits on behalf of InfoSpace under Section 16(b) of the Exchange Act.

2/ These facts are taken from the district court opinions and from record materials supporting the facts as set forth in the opinions.

3/ Named as defendants in addition to Mr. and Mrs. Jain are three trusts established by the Jains for the benefit of their children.

Naveen Jain and his wife established three trusts for tax purposes in mid-1998. They are the Naveen Jain Grantor Retained Annuity Trust No. 1 ("NJGRAT"), the Anuradha Jain GRAT Trust ("AJGRAT"), and the Jain Family Irrevocable Trust ("Family Trust"). All three trusts were irrevocable. Declaration of Naveen Jain in Support of Jain Defendants' Motion for Summary Judgment, Dkt. No. 71, Exhs. A, B, and C (1 ER 51, 61, 71). 4/ The two GRATs were each initially funded with two million shares of InfoSpace stock and the Family Trust was funded with one million shares. Naveen Jain and his wife received an annual annuity from the two GRAT trusts, and the remainder of the trusts' estates were to be paid out to their children. Unlike the GRAT trusts, the Family Trust paid no annuity to Mr. and Mrs. Jain. Atul Jain, Naveen Jain's brother, is the trustee of all three of the trusts and is the owner of the trust estates until they are paid out to the children. *Dreiling v. Kellett,* 281 F. Supp. 2d at 1217. *See also* Declaration of Naveen Jain, Dkt. No. 71, Exhs. A, B, & C (1 ER 51, 61, 71).

a. The Alleged Purchases

Plaintiff alleges that the Jains engaged in four separate purchases of InfoSpace stock from the trusts that, when matched with sales within six months of the

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4/ Where a cited document is located in the Defendants-Appellants Excerpts of Record, __ ER __ refers to the volume and page number of the Excerpts of Record. In all cases, the civil docket number, the name of the document, and page numbers are supplied.

purchases, subject them to liability for short-swing profits under Section 16(b). The first purchase is alleged to have occurred in December 1998 when Naveen Jain allegedly took one million shares of InfoSpace stock from the NJGRAT Trust and placed it in escrow to satisfy a personal indemnity obligation. Specifically, as InfoSpace was preparing its initial public offering in late 1998, the board of directors learned that Naveen Jain might have incurred liability for InfoSpace through options grants and disputes arising out of commercial contracts. Accordingly, the board required him to personally indemnify InfoSpace for potential claims against the company by placing one million shares in escrow, with InfoSpace as the escrow agent. 281 F. Supp. 2d at 1217.

On December 11, 1998, Naveen Jain executed an agreement with InfoSpace to establish the escrow. Declaration of Richard Spoonemore ("Spoonemore Decl."), Dkt. No. 83, Exh. 25 at 2-3 (2 ER 378-79). The law firm of PerkinsCoie, attorneys for InfoSpace, drafted an amendment to the IPO registration statement stating that Naveen Jain had placed one million shares of common stock, previously held by the NJGRAT Trust, in escrow, with Naveen Jain retaining voting control over those shares. *Dreiling v. Kellett,* 281 F. Supp. 2d at 1217. *See, e.g.,* Spoonemore Decl., Dkt. No. 83, Exh. 25 at 2-3 (2 ER 378-79). This amendment was filed with the Commission. *See, e.g.,* Spoonemore Decl., Dkt. No. 83, Exh. 25 at 1 (2 ER 378).

Over the period of a year, Naveen Jain signed, or authorized his attorney in fact to sign, several filings with the Commission stating that he had placed the NJGRAT shares in escrow. *Dreiling*, 281 F. Supp. 2d at 1218. *See also* Spoonemore Declaration, Dkt. No. 83, Exhs. 25-39 (2 ER 361-89). After one year passed with no actions being brought against InfoSpace, Naveen Jain asked that the stock in escrow be released. The board complied with his request in early 2000. 281 F. Supp. 2d at 1218. Previously, the shares had been inadvertently returned to the NJGRAT Trust in connection with the exchange of pre-IPO stock certificates for post-IPO certificates. Plaintiff's Motion for Summary Judgement and Response to Defendants Motion for Summary Judgment ("Plaintiff's Response"), Dkt. No. 82 at 11.

The remaining three alleged purchases occurred in May 1999 when Mr. and Mrs. Jain deposited shares owned by the trusts into their personal brokerage account. Specifically, at that time InfoSpace stock underwent a two-for-one stock split. Pursuant to the split, InfoSpace issued new stock certificates representing the new shares and sent them to its shareholders. The split shares were sent to the Jains, either at InfoSpace's offices or at their home. Although the certificates were marked as belonging to the trusts, Plaintiff's Response, Dkt 82, Exhs. 58, 61, and the accounts for the trusts were maintained at Banc of America Securities, the Jains sent the shares to their personal trading account at Hambrecht & Quist ("H&Q"). 281 F. Supp. 2d at 1218; Defendants Consolidated Response to Plaintiff's Cross Motion for

Summary Judgment ("Defendants' Response"), Dkt. No. 92 at 3-4.

After receiving the shares, H&Q sent Naveen Jain a draft letter of authorization that purported to make a gift of the NJGRAT shares to him from the trust. Naveen Jain completed the form and returned it to H&Q. Similarly, Naveen Jain's wife provided a letter of authorization purporting to gift the AJGRAT split shares to her. Plaintiff's Response, Dkt. No. 82 at 14; Spoonemore Decl., Dkt. No. 83, Exh. 1 at 124; Exh. 58 at NJ001181; Exh. 59 at NJ001376 (2 ER 477, 483). The GRAT split shares were then deposited into the Jains' personal account. 281 F. Supp. 2d at 1218; Plaintiff's Response, Dkt. 82 at 14. 5/

As a result of these alleged purchases, three deposits of InfoSpace stock were made in an account designated as the Jains' personal trading account at H&Q: two deposits of 999,236 shares (the NJGRAT and AJGRAT shares reregistered in the names of the Jains) and one deposit of 500,000 shares belonging to the Family Trust. Spoonemore Decl., Dkt. No. 83, Exh. 63 at NJ001448 (2 ER 401). 6/ The Jains held these shares, and voted them, until 2000 when the Jains assert that a "transfer error"

5/ The Family Trust split shares were deposited in the Jains' account without a gift letter being required. 281 F. Supp. 2d at 1218; Plaintiff's Response at 13.

6/ The record indicates that the trustee of the trusts, Atul Jain, was apparently unaware of the alleged taking of the trusts' shares by the Jains. Spoonemore Decl., Dkt. No. 83, Exh. 3 at 79, 85.

was discovered. 7/ The Family Trust shares were then reconveyed in May 2000. 281 F. Supp. 2d at 1218. Following an internal investigation, the split shares belonging to the two GRAT trusts were returned to these trusts in December 2000 (id.). 8/

b. The Sales

There is no dispute regarding the Jains' sales of InfoSpace stock. On April 6, 1999, the Jains sold 1,000,000 shares of InfoSpace stock, receiving $85,600,000. On April 12, 1999, they sold 210,000 shares for $17,955,000. And on May 13, 1999, they sold 1,800,000 shares for $98,966,696. There is no dispute that each sale occurred within six months of the alleged December 1998 purchase or one of the subsequent three alleged May 1999 purchases. 281 F. Supp. 2d at 1237.

7/ A paralegal at InfoSpace, who was responsible for tracking shares, testified that she first noticed the discrepancy in the Jains' account. Spoonemore Decl., Dkt. No. 83, Exh. 6 at 14-15. Naveen Jain contends, however, that he requested that InfoSpace undertake an internal investigation that identified a transfer error. 281 F. Supp. 2d at 1218; Defendants Consolidated Response, Dkt. No. 92 at 3-4.

8/ While 2,000,000 InfoSpace shares were initially deposited in each of the GRAT trusts and 1,000,000 were initially deposited in the Family Trust, the number of split shares derived from the shares held by the trusts as the result of the May 1999 two-for-one stock split was approximately half the shares initially deposited in each trust. This discrepancy is the result of a reverse, one-for-two, stock split that took place in August 1998. Thus, at the time of the first alleged purchase in December 1998, each trust held approximately one half of the number of InfoSpace shares initially deposited in the trust. Plaintiff's Response, Dkt. No. 82 at 13, n.2.

2. Decision of the District Court

The defendants moved for summary judgment, and the plaintiff responded with a cross-motion for summary judgment. The district court issued a decision denying the Jains' motion for summary judgment and granting the plaintiff's cross-motion. *Dreiling v. Kellett,* 281 F. Supp. 2d 1215 (W.D. Wash. May 14, 2003). The court held that the defendants' acquisitions of the stock constituted purchases for purposes of Section 16(b). *See* 281 F. Supp. 2d at 1222.

Having received a favorable ruling on his cross motion for summary judgment, the plaintiff moved for judgment as to the amount of profits to be recovered from the Jains. In its decision granting plaintiff's motion, *Dreiling v. Jain,* 281 F. Supp. 2d 1234 (W.D. Wash. Aug. 22, 2003), the court wrote that "[c]alculating the profit in this case is straightforward" because "[t]he Jains paid nothing for shares that were transferred, and therefore their purchase price is $0." 281 F. Supp. 2d at 1239. The Jains were therefore held liable for the full amount of the $202,551,696 in proceeds from their April and May 1999 sales. The court awarded prejudgment interest of $44,571,016 for a total judgment of $247,122,712. *id.* at 1242.

DISCUSSION

I. IN CALCULATING PROFITS THE DISTRICT COURT IMPROPERLY DISREGARDED THE OFFSETTING OBLIGATION INCURRED BY THE DEFENDANTS TO RETURN THE SHARES OR, AT A MINIMUM, TO PAY TO THE TRUSTS THE MARKET VALUE OF THE SHARES AT THE TIME OF ACQUISITION.

When the Jains took the shares from the trusts, they did not take them free and clear. They incurred offsetting obligations to the trusts - - obligations that affect whether they made a profit and, if so, how much. These offsetting obligations are important in this case because Section 16(b) is a profits-based provision. It does not declare conduct unlawful; it is a strict liability provision that allows recovery only if the insider receives profits. 9/ In the case of a routine purchase, the calculation of profits simply involves subtracting the agreed-upon purchase price from the agreed-upon sales price, and the purchase price in this regard is the amount paid to buy the shares. The Jains' acquisitions of stock, however, were not routine; there was no agreed-upon price that they paid. This does not mean, as the district court concluded, that the Jains' profits should be calculated based on a "purchase price" of zero. Rather, the profits determination must reflect that the purchase price was the amount of the offsetting obligation that the Jains incurred. By disregarding that obligation and using a zero purchase price, the district court departed from the

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9/ *See* V Louis Loss & Joel Seligman, *Securities Regulation* 2345 n.28 (3d ed. 2001).

profits-based nature of Section 16(b). 10/

Thus, in determining whether the Jains realized profits, it is necessary to take into account their offsetting obligation to return the shares to the trusts. Where a defendant incurs an obligation to return the securities that he has acquired, he cannot realize any profits: any profits inure to the person from whom the securities were acquired and not to the defendant. Because of the Jains' obligation to return the shares to the trusts, the trusts effectively remained the beneficial owners of the securities, even after the Jains acquired possession of them, and any benefits resulting from fluctuations in the value of the securities were realized by the trusts and not by the Jains.

The situation involved here is analogous to a loan of securities. Bona fide pledges and loans of securities have long been regarded as being beyond the scope of Section 16(b) because, as here, there is no change in beneficial ownership. *See Interpretative Release on Rules Applicable to Insider Reporting and Trading,* Exchange Act Release No. 18114, 23 S.E.C. Docket 856, 1981 WL 31301 at *61 n.64 (September 24, 1981). *See also Log On America v. Promethean Asset Management L.L.C.,* 223 F. Supp. 2d 435, 449-50 (S.D.N.Y. 2001) (sales cannot be matched with shares borrowed to

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10/ As discussed, *infra* pp.16-17, the insider should not be allowed to assert an offsetting obligation in this context unless he both had, and has satisfied, the obligation.

cover short sales).

Because Section 16(b) is a strict liability provision that looks only to defendants' "profits," failure to consider the lack of any change in beneficial ownership can produce inappropriately harsh results. For example, consider an insider who has held shares for several years. On January 1, the insider sells the shares; one month later, on February 1, he acquires shares from a trust as the Jains did; and he returns the shares to the trust one week later. It should be apparent that the insider has realized no short-swing profit. Yet under the district court's holding, he would be liable for the full amount of the proceeds of his sale. 11/

Ignoring the offsetting obligation incurred by the Jains to the trusts, and making the Jains liable for the full amount of the proceeds of their sales, is contrary to Section 16(b)'s objective to recover *short-swing* profits. Under Section 16(b) an issuer is entitled to recover profits made by a statutory insider from purchases and sales of the issuer's securities, but only within a period of less than six months. The provision was not intended to recover long-term increments in the value of the security. In reviewing the abuses that gave rise to the enactment of Section 16(b), the Commission stated in 1950:

11/ Under Section 16(b), the insider is liable irrespective of which transaction - - the purchase or the sale - - occurs first.

> The legislative history makes clear a basic purpose to deter manipulative activity and abuse of inside information by insiders. This purpose must of course be related to the discrimination section 16(b) makes between long term investment and short-swing speculation. * * * Congress evidently did not intend to discourage those who manage and control a company from having an investment stake in it * * *.

Statement Upon Rule X-16b-6, Exchange Act Release No. 4509 (Oct. 30, 1950) (*quoted in Kornfeld v. Eaton,* 217 F. Supp. 671, 676-677 (S.D.N.Y. 1963), *aff'd,* 327 F.2d 263 (2d Cir. 1964)). The district court's use of a zero purchase price impermissibly results in recovery of any long-term increment in the value of the shares. Indeed, the district court's judgment provides recovery of all gains in the value of the InfoSpace securities occurring since the inception of the company.

Even if the Court does not agree that the obligation to return the shares eliminated the potential for defendants to realize any profit under Section 16(b), defendants should be permitted to deduct from the proceeds of their sales the market value of the shares at the time of their acquisition. This amount, at a minimum, was owed to the trusts. Imputing the value of the securities at the time of acquisition as the purchase price is supported by the use of a similar method in another context under Section 16(b). Rule 16b-6(c) requires looking to the price of the underlying securities on the purchase and sale dates to calculate short-swing profits made on transactions involving certain derivative securities. In addressing that calculation, the

Commission said that "the maximum short-swing profit recovery is the difference in market value of the underlying security between the date of the purchase and the date of sale." *Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Exchange Act Release No. 28869, 56 Fed. Reg. 7242, 7254, 1991 WL 311110, at *7254 (Feb. 21, 1991).

The burden should be upon the insider to establish the existence and amount of any offsetting obligation arising from his acquisition of the securities. 12/

12/ Sources for such an obligation include common law principles of trusts, torts, and unjust enrichment. *See, e.g., Restatement (Second) of Trusts* §291 (1959); *Restatement (Second) of Torts* §222A (1965); *Restatement (Third) of Restitution and Unjust Enrichment*, § 1 (tentative draft 2002). As applied to this case, for example, "[a] basic rule of equity is 'that one should not be unjustly enriched at the expense of another.'" *Bonneville Power Administration v. Washington Public Power Supply System*, 956 F.2d 1497, 1505 (9th Cir. 1992) (*quoting Lynch v. Deaconess Medical Ctr.*, 776 P.2d 681, 683 (Wash. App. 1989)). "A person who is unjustly enriched at the expense of another is liable in restitution to the other." *Restatement (Third) of Restitution and Unjust Enrichment* §1.

Property may not be transferred from a trust in violation of the terms of the trust. *See, e.g., In re Eustace' Estate*, 87 P.2d 305, 307 (Wash. 1939). Whether the defendant acted intentionally or, as the Jains claim here, innocently, may not make a difference under principles of unjust enrichment. A duty to provide restitution can arise from even an "innocent conversion" of property, *see Restatement (First) of Restitution*, §154 (1937), and a "constructive trust may arise even though acquisition of the property was not wrongful." *Scymanski v. Dufault*, 491 P.2d 1050, 1057 (Wash. 1972) *(citing Restatement (First) of Restitution*, §160). *See also Omer v. Omer*, 523 P.2d 957, 961 (Wash. App. 1974) (affirming imposition of a constructive trust where there was no finding of fraud, misrepresentation, or overreaching). Thus under the law of unjust enrichment the Jains incurred an obligation to return the securities or, at a minimum, their fair market value at the time of their acquisition from the trusts. *See Restatement*

Moreover, in the absence of a contract evidencing the acquisition of the securities (as in a bona fide loan), special care must be taken not to allow the insider to make a spurious claim that he incurred an offsetting obligation to the person from whom he acquired the securities. In order to ensure that he in fact incurred the requisite obligation (here, to return the shares or to pay the market value at the time of acquisition), and also to ensure that he retains no profits, the Commission believes that the insider should not be allowed to assert an offsetting non-contractual obligation except where he not only had, but also has satisfied, that obligation. In addition, in order to further ensure that the insider understood and fully appreciated the obligation, satisfaction of the obligation ordinarily must take place prior to a Section 16(b) demand for suit being made upon the issuer by a shareholder or, in the absence of demand, prior to the filing of the complaint. 13/

(First) of Restitution §154 and §160.

13/ Here the securities allegedly acquired by the Jains were returned to the trusts in 2000. No demand upon the issuer was made prior to the filing of the initial complaint in September 2001 on the ground that a demand would be futile. Complaint, Dkt. No. 1 at 3. Subsequently, plaintiff made an unsuccessful demand upon the issuer in October 2001. First Amended Complaint, Dkt. No. 6 at 4 (1 ER 4). Plaintiff's First Amended Complaint was then filed in December 2001. Dkt. No. 6 at 1 (1 ER 1).

II. IF NAVEEN JAIN'S ACQUISITION OF THE ESCROW SHARES IS DETERMINED TO BE A "PURCHASE" BY HIM, HE IS ENTITLED TO THE EXEMPTION IN RULE 16a-9 FOR HIS SUBSEQUENT ACQUISITION OF STOCK SPLIT SHARES DERIVED FROM THE ESCROW SHARES.

Should the court determine that the alleged transfer of InfoSpace stock from the NJGRAT Trust into escrow constitutes a purchase by Naveen Jain for purposes of Section 16(b), he is then entitled to an exemption from Section 16(b) liability for his later acquisition of the stock split shares derived from the escrowed stock. Rule 16a-9(a), 17 C.F.R. 240.16a-9(a), provides an exemption from Section 16 for "[t]he increase or decrease in the number of securities held as a result of a stock split * * * applying equally to all securities of a class * * * ." In adopting Rule 16a-9, the Commission reasoned that acquisition of additional securities through stock splits should be exempt because "these are non-discretionary transactions, and do not present the opportunity for abuse intended to be addressed by section 16." *Ownership Reports,* 56 Fed. Reg. 7242 , 7259, 1991 WL 311110, at *7259.

In December 1998, InfoSpace stock from the NJGRAT Trust was alleged to have been placed in escrow. On May 5, 1999, InfoSpace undertook a two-for-one stock split. Accordingly, if the alleged transfer of stock from the NJGRAT Trust into escrow is deemed a purchase by Naveen Jain, the Jains held those shares at the time they acquired the split shares derived from them in May 1999. Therefore, the acquisition of the stock split shares derived from the escrowed NJGRAT shares, and

deposited in the Jains' H&Q account, would be exempted from Section 16 by Rule 16a-9. 14/ The Jains should not be held liable for any profits attributable to the sale of shares matched with this acquisition.

14/ This exemption is inapplicable to the AJGRAT split shares or the Family Trust split shares because the InfoSpace stock from which they were derived was held by the trusts and not by the Jains at the time the Jains acquired those split shares.

CONCLUSION

The judgment of the district court should be reversed because, whether or not there was a purchase for purposes of Section 16(b), the defendants realized no profits recoverable under that provision; because recovery should, in any event, be restricted to the difference between the market value of the shares at the time of their acquisition and the proceeds from the defendants' sales of the issuer's stock; and because the acquisition of stock split shares by the defendants attributable to stock allegedly transferred into escrow is exempt under Rule 16a-9.

Respectfully submitted,

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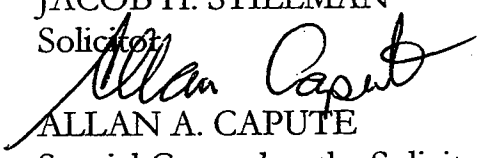

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CERTIFICATE OF SERVICE

I, Allan A. Capute, am a member of the bars of Maryland and the District of Columbia, and I hereby certify that on the 1st day of March 2004, I caused to be served two copies of the *Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of Reversal and of Positions that Favor the Defendants-Appellees* by overnight Federal Express to:

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Plaintiff-Appellee,

v.

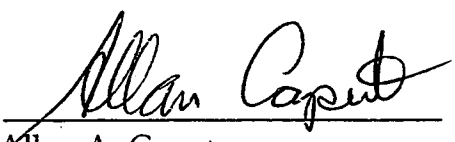
NAVEEN JAIN and
ANURADHA JAIN, husband and wife and their marital community,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached *Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of Reversal and of Positions that Favor the Defendants-Appellants* is proportionally spaced, has a typeface of 14 points, and contains 4777 words.



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