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IN THE SUPREME COURT OF THE UNITED STATES

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CREDIT SUISSE SECURITIES (USA) :

LLC, ET AL., :

Petitioners : No. 10-1261

v. :

VANESSA SIMMONDS :

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Washington, D.C.

Tuesday, November 29, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

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JEFFREY I. TILDEN, ESQ., Seattle, Washington; for
Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

JUSTICE SCALIA: We'll hear argument next in Case Number 10-1261, Credit Suisse Securities v. Simmonds.

Mr. Landau, you may proceed.

ORAL ARGUMENT OF CHRISTOPHER LANDAU
ON BEHALF OF THE PETITIONERS

MR. LANDAU: Justice Scalia, and may it please the Court:

In section 16(b) of the 1934 Exchange Act, Congress created a cause of action to allow securities issuers to recover short-swing profits from certain covered persons, but specified that a lawsuit must be brought 2 years after the date the short-swing profit was realized. The statute doesn't say 2 years after the date the defendants filed a section 16(a) report, as the Ninth Circuit and Respondents would like to have it. Nor does the statute say 2 years after the date the plaintiff discovers the short-swing transaction, as the Government would like to rewrite it.

I'd like to make two basic points here today: First, as this Court recognized in *Lampf*, the 2-year time limit in section 16(b) is best read as a period of repose that can't be extended at all; and,

1 second, even if section 16(b)'s 2-year time limit could
2 be extended, the doctrine of equitable tolling wouldn't
3 apply to extend the time limit here, where the plaintiff
4 didn't act diligently to bring a claim and didn't prove
5 that any extraordinary circumstances precluded her from
6 filing. The upshot of these two points is that this
7 Court should reverse the Ninth Circuit's decision and
8 remand the case with directions to dismiss the complaint
9 as untimely.

10 JUSTICE GINSBURG: On your first --

11 JUSTICE SOTOMAYOR: Counsel, would --

12 JUSTICE GINSBURG: On your first point, you
13 cite *Lampf*, but *Lampf* had two limits. So, it said --
14 what was it, 1 year from whatever, from discovery. And
15 then it set an outer limit at 3 years, and it was the
16 same thing in *Merck*. Here we just say -- it just has
17 what seems to me a plain vanilla statute of limitations
18 that is traditionally subject to waiver, equitable
19 tolling. We don't have that special kind of statute
20 that gives you one limit and then sets a further limit
21 that will be the outer limit.

22 MR. LANDAU: Your Honor, with respect, it's
23 certainly true that a two-pronged time limit underscores
24 that the outer prong is a period of repose, but there's
25 certainly no magic words that Congress has to use. It

1 doesn't have to use a two-pronged time limit to
2 establish the outer limit as a period of repose. In
3 fact, that's really the lesson of this Court's decision
4 in TRW and in Beggerly and Brockamp, that the -- the
5 background or the default rule, the background rule that
6 equitable tolling applies, isn't some kind -- is just
7 that. It's a background rule. And Congress, in the
8 text or structure --

9 JUSTICE KAGAN: But what takes you out of
10 that background rule in this case? You don't have the
11 two-pronged structure, which really did, as Justice
12 Ginsburg said, drive the analysis when we -- when we
13 talked about those provisions. So, that's not there.
14 So, what takes you out of the default position, which is
15 equitable tolling applies?

16 MR. LANDAU: Sure, Your Honor. I think --

17 JUSTICE KAGAN: On the statute of
18 limitations --

19 MR. LANDAU: The key point, Your Honor, is
20 that this Congress in the 1934 Exchange Act was
21 carefully attuned to the issue of time limits.
22 Congress -- there was -- there was a lot of discussion
23 of this. This is a not a situation where Congress
24 established a liability and just didn't focus on this
25 issue, as often happens, and left it to background

1 statute of limitations provisions or other background
2 rules. Congress thought long and hard about this.

3 With respect to the two-prong provisions,
4 those are the fraud provisions that were set at an outer
5 limit of 3 years. And then they actually created a
6 discovery rule that said we don't even want people to
7 wait the whole 3 years; if they've discovered the facts
8 underlying their claim, we want them to bring it within
9 a year. So, they used discovery to shorten the time,
10 not to extend it.

11 JUSTICE KAGAN: Right. But I guess I'm
12 still not understanding why, if you look at this
13 provision, you would think of this as anything other
14 than an ordinary statute of limitations. What is it
15 about this provision -- or, I don't mean to -- to -- I
16 mean, you can -- you can make structural arguments. But
17 -- but, you know, what factors do you think in this
18 provision makes it a statute of repose?

19 MR. LANDAU: Two things, Your Honor. First,
20 I'd like to just finish on the structural point; and we
21 also have a textual argument.

22 With respect to the structure, this, let's
23 not forget, was enacted at the same time and as part of
24 the same statute as these other provisions that did use
25 discovery provisions to shorten the time limit. What

1 Congress did with respect to 16(b), instead of having
2 the 3-year outer limit plus a safety valve that would
3 make you have to sue even sooner, Congress has brought
4 in the outer limit. The -- instead of 3 years as in the
5 two-prong provisions, said you've got to sue within 2
6 years. Having said you've got to sue within 2 years,
7 they decided you didn't need that safety valve
8 provision. But it would be very --

9 JUSTICE GINSBURG: The problem is it reads
10 like dozens of statutes of limitations. It says no suit
11 more than 2 years and that -- I think that the general
12 understanding is that that limitation, that kind of
13 limitation -- there is a presumption that it is subject
14 to equitable tolling, forfeiture, waiver. And why, if
15 this one doesn't use any different words, why should --

16 MR. LANDAU: Two things, Your Honor. This
17 legislation -- again, this section 16 is not a
18 stand-alone statute. It was enacted as part of the '34
19 Act. And so, I think you -- the same Congress that set
20 a hard outer limit of repose for fraud claims in section
21 9(e) and 18(c) wouldn't have wanted with respect to this
22 prophylactic provision that it is, by definition, both
23 under- and over-inclusive. It may be --

24 JUSTICE KAGAN: Well, I could turn the
25 argument around on you. Congress surely knew how to

1 write a statute of repose because it did it in this
2 statute, but it didn't do it with respect to these kinds
3 of violations. This statute of limitations, I'm going
4 to call it, reads very differently from the two-pronged
5 positions that we've interpreted in the past.

6 MR. LANDAU: Again, Your Honor, I think one
7 point, just to respond to that and as well to Justice
8 Ginsburg's question, the -- the typical textual hook for
9 a statute of repose is that it's keyed off of the
10 defendant's conduct -- 2 years after the defendant does
11 X, Y, or Z. That is -- as we quoted Black's Law
12 Dictionary for this proposition in our brief. The
13 Seventh Circuit, Justice Posner, had an opinion just
14 last week underscoring this point, the Hy-Vee case, that
15 said the typical statute of limitations actually says 2
16 years after the cause of action accrued or after the
17 plaintiff discovered, but when you're -- when -- again,
18 we don't think -- in this case, we are not relying
19 solely on the textual thing, but in terms of numbers of
20 guideposts, this is not your classic statute of
21 limitation. If you actually start looking at them, a
22 lot of them key off of accrual.

23 JUSTICE ALITO: Is that -- is that true? If
24 we were to look at all the statutes of limitations in
25 the -- in the U.S. Code, we would find that they are

1 generally or exclusively drafted like section 1658, the
2 general statute of limitations provisions, and are
3 geared to or are triggered by the accrual of the action
4 rather than some event?

5 MR. LANDAU: Your Honor, I think we can't
6 say that there is a bright-line rule. Congress --
7 again, I think the most we can say is that the classic
8 formulation of a statute of repose is to key a time
9 limit off of the defendant's conduct as opposed to the
10 accrual. And, again --

11 JUSTICE SOTOMAYOR: Well, the problem is
12 that the injury here is the defendant's conduct, meaning
13 if the nature of the claim, as is here, that someone has
14 received a profit they're not entitled to, then the
15 injury is the same. The profit belonged to the
16 shareholders or the corporation, not to the insider.
17 So --

18 MR. LANDAU: Clearly to the -- yes.

19 JUSTICE SOTOMAYOR: -- textually the nature
20 of the claim here is the very injury, plaintiff's
21 injury.

22 MR. LANDAU: Well, Your Honor, again, one of
23 the things about this statute that's kind of odd, it's a
24 prophylactic statute that doesn't even require any
25 injury. I mean, it just says there has got to be

1 disgorgement to the corporation. It's a little bit
2 different --

3 JUSTICE SOTOMAYOR: Well, disgorgement is
4 injury, meaning that it's something that -- that you're
5 taking away from someone else.

6 MR. LANDAU: But it's taking it away from
7 the defendant. It doesn't actually mean that actually
8 somebody else would have earned that money.

9 JUSTICE SOTOMAYOR: Tell me what logic there
10 is in reading this as a statute of repose, other than
11 your argument about finality and its importance.

12 MR. LANDAU: I think --

13 JUSTICE SOTOMAYOR: If we take your
14 adversary's position that this statute of limitations
15 was geared under an understanding that an insider would
16 in fact make the requirements -- would file the
17 statements required by 16(a), then it makes absolute
18 sense to think of it as a statute of repose. But if
19 Congress understood that some wouldn't do the statutory
20 requirement and file in a timely manner, why wouldn't
21 equitable tolling be a more appropriate way to look at
22 this?

23 MR. LANDAU: I think the key point, Your
24 Honor, is to look at the 1934 Exchange Act as a whole,
25 which includes not only this provision but also

1 out-and-out-fraud provisions that are for intentional,
2 real hard-core insider trading. That would be sections
3 9(e) and 18(c). There is no question that Congress
4 provided a period of repose for those, the outer limit.

5 And then that raises the question that
6 Justice Ginsburg started with, which is, do you have to
7 have a two-prong limit? And the answer to that is no,
8 you don't -- there's no magic words, as TRW, Beggerly,
9 and Brockamp show us. You just have to try to make
10 sense of the statute as a whole. And Congress would not
11 have wanted to give repose to intentional fraudsters but
12 not give repose to a defendant in a purely prophylactic
13 section 16(b) action. I think that's the fundamental
14 thing when you just step back and look at this.

15 JUSTICE GINSBURG: Well, it's -- it's not
16 simply a prophylactic. I mean, there's an objective
17 that 16(a) expresses; that is, Congress wanted these
18 trades to be reported and to have the form filed, Form 4
19 filed. So, it's a -- it's a disclosure-forcing
20 provision, 16(a) is. Then, why would Congress mean for
21 it to operate to immunize a defendant who has not made
22 that filing and who has concealed what was supposed to
23 be reported in 16 -- under 16(a)?

24 MR. LANDAU: Your Honor, for the same reason
25 that Congress would have afforded repose even to

1 out-and-out fraudsters. Again, Congress was creating
2 vast new liability here. A fraudster by definition, as
3 somebody who would be liable under 18(c) or 9(e), has
4 done kind of to conceal it. Yet, Congress still
5 believed, because it was creating this vast new
6 liability --

7 JUSTICE KAGAN: Judge Posner, Mr. Landau,
8 has a theory for why it is that fraud is treated
9 differently from the 16(b) offenses, and it's that it's
10 much more important to prevent strategic behavior
11 involving timing in fraud suits -- the stock price goes
12 up, the stock price goes down -- whereas, in these
13 suits, damages are fixed. It doesn't really matter
14 where you bring them. So, it's not nearly as important
15 to set a clear limit.

16 MR. LANDAU: Well, like many of Judge
17 Posner's theories, it's -- it's a very clever theory,
18 but in a sense, it misses the fundamental truth that
19 when Congress is granting repose, it is trying to allow
20 people to turn the page on something in their past. The
21 idea that Congress would grant repose to more culpable
22 people but not to less culpable people --

23 JUSTICE KAGAN: Well, you have one theory,
24 which -- which deals with culpability; and he has
25 another theory, which deals with strategic behavior.

1 And I don't know how to pick between those two theories,
2 to tell you the truth. The text doesn't suggest which
3 one Congress was thinking about. And that puts me back,
4 and let's look at this provision, and this provision
5 looks like an ordinary vanilla statute of limitations.

6 MR. LANDAU: Well, again, the only thing
7 I'll say on repose before -- and I'd like to turn
8 then -- because we certainly don't need repose to win
9 this case, and -- and while we think it is best
10 characterized, this Court in *Lampf* had occasion to look
11 at all of the various time limits and see how they all
12 worked together. And this Court characterized section
13 16(b) as a statute of repose.

14 To be sure, that was dicta because *Lampf*,
15 itself was not a 16(b) case. But it was -- it was -- it
16 was a statement or it was a recognition that came after
17 looking at all of these, and it would be strange now to
18 say that, in fact, the 16(b) time period is
19 potentially -- the Court said it was more restrictive,
20 and both the majority and Justice Kennedy in dissent
21 agreed that it was a statute of repose.

22 JUSTICE SCALIA: Of course, *Lampf* was a
23 disaster, wasn't it? Congress had to try to patch up
24 what we had done.

25 MR. LANDAU: Absolutely not, Your Honor.

1 (Laughter.)

2 MR. LANDAU: Lampf stands as a landmark.

3 But -- but let me make clear, Your Honor. Our position
4 here today doesn't depend on this being a statute of
5 repose, because even if this 2-year time limit --

6 JUSTICE ALITO: Before you turn away from
7 the statute of repose, could I just ask you one more
8 question --

9 MR. LANDAU: Absolutely.

10 JUSTICE ALITO: -- on -- on that? If -- if
11 16(a) reports are not filed, how likely is it that a
12 potential 16(b) plaintiff will find out within the
13 2-year period that there were these trades?

14 MR. LANDAU: Your Honor, they can find out
15 in many ways, the same ways that any other securities
16 plaintiff, including a fraud securities plaintiff, can
17 find out. There are corporate books and records that
18 can be examined. There are other SEC filings and SEC
19 investigations. There's other litigation. This could
20 come up in an estate discovery -- estate or divorce
21 proceedings. There are whistle blowers, confidential
22 informers, brokers, counterparts -- counterparties.

23 Again, if Congress had wanted the section
24 16(a) disclosure to be the trigger under section 16(b),
25 it could have done so. And, in fact, as we noted in our

1 brief, there was an early draft in the House that
2 created a two-prong provision and established for -- you
3 know, it's an outer limit of 3 years and an inner limit
4 of 6 months after the 16(a) disclosure.

5 JUSTICE ALITO: What would -- what are the
6 other filings that might disclose this?

7 MR. LANDAU: Well, Your Honor, again,
8 like -- this case is a good example. In this very case,
9 the contradiction at the heart of the plaintiff's case
10 is that they say, well, it can't possibly be discovered
11 without a 16(a) filing. There was no section 16(a)
12 filing. To this day, they say the statute of limitation
13 has not started to run.

14 JUSTICE SOTOMAYOR: Is there a public
15 document that a -- that a shareholder can look at to see
16 whether an insider has traded within 6 months?

17 MR. LANDAU: Well, Your Honor, there is not
18 a -- there is not a Form 4, which is a public document.
19 But not every securities filing requires a public
20 document. In --

21 JUSTICE SOTOMAYOR: I didn't ask that. I'm
22 going back to Justice Alito's question, which is how
23 easy is it to find out without the 16(a)?

24 MR. LANDAU: Well, again, there may be SEC
25 filings. There are --

1 JUSTICE SOTOMAYOR: That's a big thing. I
2 didn't ask maybe.

3 MR. LANDAU: Well, no, there -- there are
4 SEC filings that companies are required to make. There
5 are -- again, this is not a -- a -- selling -- buying
6 and selling shares is not something that can be done
7 alone in the dark of night. You need to have other
8 people involved with you. You need to have brokers
9 complicit. You -- it's a large amount of shares. The
10 counterparties --

11 JUSTICE SOTOMAYOR: And so, what's the
12 likelihood that a broker's going to turn you in?

13 MR. LANDAU: There are whistle blowers.
14 That's the -- that's the --

15 JUSTICE SOTOMAYOR: That's a very nice
16 thing, but what -- how likely is that?

17 MR. LANDAU: Your Honor, brokers have their
18 own responsibilities. A broker could be held liable as
19 an aider or abettor to a violation.

20 JUSTICE SOTOMAYOR: How would the broker
21 know that the -- that his principal didn't file a form
22 he was required to?

23 MR. LANDAU: Well, again, the broker may get
24 suspicious if the -- a broker may actually be checking.
25 If a -- if a -- if a CEO of a corporation is suddenly

1 selling all these things -- again, this is no different
2 than the way -- a securities plaintiff in an out-and-out
3 fraud case, and those are brought every day, Your Honor.

4 But, again, I think the point here is that,
5 regardless of whether this is repose, even if you say
6 that this can be extended, it certainly can't be
7 extended in the way that the Ninth Circuit extended it.
8 And we and the SEC, the Government, agree on this: That
9 the Ninth Circuit adopted this absolute black-letter
10 rule that says it is tolled -- it doesn't even start to
11 run unless and until the section 16(a) report is filed.

12 JUSTICE GINSBURG: How about the Second
13 Circuit rule?

14 MR. LANDAU: The Second Circuit rule is more
15 of a notice approach that says that it -- but, again,
16 Your Honor, the problem with the Second Circuit's
17 approach is that it doesn't reflect traditional
18 background norms of equitable tolling. Then, if you say
19 it's not a statute of repose, then what do you do just
20 to figure out what Congress would have wanted? You say
21 Congress legislates against the -- the -- the backdrop
22 of these kind of equitable doctrines. So, let's look at
23 what equitable tolling consists of.

24 This Court in many cases over the years --
25 it's been dealing with equitable tolling since almost

1 the first days of the Court, well into the 19th century.
2 In the most recent cases, the Court has made clear, in
3 the Holland case, for instance, just two terms ago, that
4 equitable tolling traditionally has two minimum
5 requirements.

6 First, there has to be diligence on the part
7 of the plaintiff. And in this context that means does a
8 reasonable -- did the plaintiff know or would a
9 reasonably diligent shareholder have reason to know of
10 the claim; and, second, extraordinary circumstances.

11 And so, with respect to the Second Circuit's
12 decision in Litzler, Your Honor, that you mentioned, I
13 think it departs from traditional equitable tolling
14 in -- in a couple of ways. Most particularly, it limits
15 it to actual knowledge. It doesn't say "know or should
16 have known," which again is the background rule, as we
17 and the Government agree.

18 The second thing with respect to Litzler
19 where it departs from the background rule is it says
20 that it is -- per se gives rise to equitable tolling not
21 to file the section 16(a) and doesn't include any kind
22 of culpability on the defendant's part. And Judge
23 Jacobs, in footnote 5 of Litzler, dropped a footnote
24 saying that he would prefer to announce a tolling rule
25 that was more consonant with, again, background rules of

1 equitable tolling, that said only when the failure to
2 file the section 16(a) was unreasonable or -- or
3 intentional, because he would say otherwise you could
4 have a purely technical or inadvertent violation that
5 would give rise potentially to equitable tolling, and he
6 didn't think that was right.

7 JUSTICE KAGAN: Mr. Landau, if we were to
8 agree with you on one or both of those two things,
9 wouldn't the normal course be to remand? And what's
10 your best argument for why we should decide it?

11 MR. LANDAU: Our best argument, Your Honor,
12 is that the district court in this case already decided
13 the very issue here. The district court said it is
14 undisputed, just on the pleadings, that -- that they
15 knew or should have known.

16 This case is probably the most egregious
17 kind of case that you can see for this proposition
18 because everything here is a replay of the IPO
19 litigation and even the Billing case that came all the
20 way to this Court. This case was filed just a few
21 months after this Court decided Billing. And in
22 particular -- they have now -- the Respondents have come
23 and said, well, what we didn't know here was group, and
24 we didn't know that the -- the underwriters were in a
25 conspiracy with the issuer insiders, and that was the

1 piece of the puzzle that we were missing. And --

2 JUSTICE GINSBURG: We have to accept the
3 plaintiffs' allegations as true. You may well be right
4 that they really knew or they should have known. But,
5 at this stage, we can't make that judgment because we
6 have to accept the plaintiffs' allegations as true.

7 MR. LANDAU: Correct, Your Honor, but you
8 are entitled, in deciding that, to look at their own
9 pleadings. And there's two important things from their
10 own pleadings.

11 First, if you look at their complaint,
12 it's -- it alleges lock-up as its theory of group. It
13 says that the plaintiffs and the -- the underwriters and
14 the issuer insiders formed a 16(a) group because they
15 had these lock-up agreements. Well, those lock-up
16 agreements were publicly known as early as the
17 prospectus of these IPOs. So, the -- the lock-up
18 agreement was no secret.

19 Second, they say, well, we -- even though,
20 like, lock-up might have been out there, we didn't know
21 there was this underpricing-based conspiracy. And even
22 assuming they could try and slice and dice it like that
23 according to the -- the legal theory, the fact is in
24 their motion to dismiss in the district court, they
25 cited -- this is docket 58 in the district court, pages

1 1 to 2 -- they go at length about the academic
2 literature regarding a conspiracy between underwriters
3 and issuer insiders that they say gives legitimacy to
4 their substantive claim. But that includes lots of
5 articles, including a 2004 article -- again, 2005 would
6 be 2 years before they filed.

7 So, they are relying in their opposition to
8 our motion to dismiss on an article -- there's a lengthy
9 footnote that says there's a ton of academic research on
10 this particular theory. So, basically, a remand is
11 unnecessary because the -- the pleaded facts by the
12 plaintiff themselves show this is untimely as a matter
13 of law.

14 I'd like to reserve the balance of my time,
15 if there's no further questions.

16 Thank you.

17 ORAL ARGUMENT OF JEFFREY B. WALL

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

19 MR. WALL: Justice Scalia, and may it please
20 the Court:

21 I'd like to start where Justices Ginsburg
22 and Kagan did, because if you picked up this statute, it
23 would look for all intents and purposes like an ordinary
24 statute of limitations. And the question then is, how
25 has Congress rebutted that presumption of equitable

1 tolling either as a matter of text, context, or
2 structure?

3 And as I understand it, Petitioners have two
4 basic arguments, both of which are incorrect. The first
5 is textual. They say, well, it runs from the time of
6 the complained-of event. But the reason they can't put
7 too much weight on that, Justice Alito, is because if
8 they looked through the statutes and the Court's cases,
9 they would come across cases like Exploration Company or
10 Delaware State College, where the statute ran from the
11 time of the complained-of event, and this Court treated
12 it as an ordinary statute of limitations subject to
13 equitable tolling; and they'd come across Beggerly,
14 which ran from accrual. And yet, the Court said statute
15 of repose not subject to equitable tolling.

16 JUSTICE ALITO: Well, if you were drafting a
17 statute of repose, how would you phrase it other than
18 the way this is phrased?

19 MR. WALL: I think normally what Congress
20 does is it says there should be no jurisdiction after a
21 particular time, because it's not trying to
22 differentiate among the application of different
23 equitable background principles.

24 But there are statutes --

25 JUSTICE SCALIA: Gee, but we've -- we've

1 said that, under our recent jurisprudence anyway, we
2 would -- we would treat that as a statute of
3 limitations. And I assume we'd treat it like a normal
4 statute of limitations subject to tolling.

5 MR. WALL: Justice --

6 JUSTICE SCALIA: You think whenever --
7 whenever we encounter a -- a statute of limitations that
8 is -- is phrased in jurisdictional term, there can be no
9 tolling?

10 MR. WALL: I think, Justice Scalia, that
11 where you have statutes that say there shall be no
12 jurisdiction after a particular time, this Court has
13 read them to cut off equitable tolling after that time.
14 But Congress could have written the statute to say the
15 time limit shall not be tolled. And there are statutes
16 like that. Now, most of those statutes say there shall
17 be no tolling except in particular circumstances,
18 because Congress has considered it more finely. But
19 they could make the prohibition absolute.

20 And the second argument that I understand
21 Petitioners to have is basically structural. They say,
22 well, look, they borrowed the language from the outer
23 prong of the two-prong limit.

24 JUSTICE ALITO: Before you get to that, do
25 you have an example of a -- a classic statute of repose

1 that I could look at to see how they should be phrased,
2 and not one that says that there shall be tolling --
3 there shall not be tolling except in some circumstances,
4 one that just says this is it; no tolling whatsoever?

5 MR. WALL: You mean other than statutes as
6 in Merck and Lampf where there were tiered structures?

7 JUSTICE ALITO: Right. Right.

8 MR. WALL: There --

9 JUSTICE ALITO: A stand-alone provision.

10 MR. WALL: I think that the statute in
11 Beggerly was an example where the Court said, even
12 though it runs from accrual, it incorporates a discovery
13 rule and it sets a 12-year limit. And so, textually and
14 contextually -- I mean, I don't think there is any
15 classic formulation. I think that's why Petitioners
16 can't point you to anything, because the courts always
17 look to all the indicia of statutory meaning: text,
18 context, and structure. So, the same language can
19 create a statute of limitations or repose.

20 So, in Lampf and Merck, if those statutes
21 hadn't had a two-tiered structure, just the language of
22 the outer prong as the statute alone, I think the Court
23 would have treated it as a statute of limitations. The
24 Court didn't say in Lampf that language creates a
25 statute of repose, full stop. It drew a structural

1 inference by looking at both of the prongs and comparing
2 them to each other.

3 So, when Petitioners say, whoa, but they
4 borrowed the language of the outer limit and we know
5 that's repose, well, we only know it's repose in the
6 two-prong provisions because of their structure. And
7 this provision doesn't have that structure.

8 So, I don't think I can point you to any
9 classic formulation because the same words can be either
10 a limitation or repose, depending on what else Congress
11 does in that statute.

12 JUSTICE SCALIA: I don't -- I think you
13 understate the -- the strength of Petitioners' argument
14 in this regard. It seems to me where you say, you know,
15 3 years unless the plaintiff knows sooner than that, and
16 then you say 2 years unless the plaintiff knows earlier
17 than that, and then you say 2 years -- it seems to me
18 that the implication is 2 years, period. Whether the
19 plaintiff knows earlier, later, doesn't matter.

20 MR. WALL: Justice Scalia, I don't know what
21 else to say except that that would overrule Exploration
22 Company and Delaware State College.

23 JUSTICE BREYER: That's what we said in
24 Merck. I mean, wasn't Merck just like that? It says a
25 cause of action can be or whatever -- may not be

1 brought -- may be brought not later than the earlier of
2 2 years after the discovery of the facts or 5 years
3 after the violation.

4 I take it that means 5 years after the
5 violation. Forget about the discovery of the facts.

6 MR. WALL: Well, that's right, but the --
7 the reason that that language created a period of
8 repose --

9 JUSTICE BREYER: Because they were both --

10 MR. WALL: -- was because of the structural
11 inference. I took Justice Scalia's hypothetical to be
12 if the statute just said no suit shall be brought more
13 than X years after the violation.

14 JUSTICE SCALIA: Well, but what if those
15 three provisions had been -- you know, followed each
16 other immediately? You know, 3 years unless, you
17 know -- with a cutoff that would make it shorter, and
18 2 years with a cutoff that would make it shorter, and
19 then a third one just says 2 years. You think there
20 would be no implication that the 2 years means 2 years,
21 period?

22 MR. WALL: I think the implication would be
23 that, in the others, Congress created a period of repose
24 by using very specific language to do that. And in the
25 third, it didn't. It wrote it like an ordinary statute

1 of limitations. Now, it could have written it
2 differently, Justice Scalia. It could have said no suit
3 shall be brought after X time, which is the ordinary
4 language of statute of limitations, and that time shall
5 not be tolled. And Congress has done that in other
6 statutes.

7 JUSTICE GINSBURG: If you extinguish the
8 claim -- the statute of limitations doesn't terminate
9 the claim. It just says you can't get a remedy if you
10 sue too late. But there are statutes that say you have
11 no claim after X time, and that would certainly be a
12 repose. You have no right anymore after that.

13 MR. WALL: No question. That's certainly
14 true. If the Court --

15 JUSTICE SCALIA: Maybe -- maybe you'd better
16 go -- well, go on. I think you'd better go to the other
17 point because I want to know whether you differ from the
18 Petitioner on the second point. As I understand the
19 Petitioner, he does -- he does not think that you reach
20 the same result if indeed the violation had been
21 nonintentional. Now, do you take that position as well?

22 MR. WALL: No, Justice Scalia. I think that
23 is the one place in everything Mr. Landau said where
24 there is daylight between the Petitioners' position and
25 ours. In the Government's view, the traditional

1 equitable rule is the statute is tolled until the
2 plaintiff has actual or constructive notice of the facts
3 underlying her claim. It doesn't matter whether the
4 concealment of those facts by the defendant that gives
5 rise to --

6 JUSTICE KAGAN: But is that right, Mr. Wall?
7 I mean, don't we usually look when we're thinking about
8 equitable doctrines as whether the defendant has clean
9 hands? You know, whether the defendant is culpable or
10 not seems to matter a good deal when we're thinking
11 about considerations of equity.

12 MR. WALL: Absolutely. And I think in many
13 fraud and concealment cases, where you are not talking
14 about a duty of disclosure, either common law or
15 statutorily, you do have affirmative misconduct. But
16 it's a different question when Congress has come in and
17 told the defendants by law what they have to do. For
18 the defendant then to breach that statutory duty -- I
19 think Congress has already told them what they have to
20 do in this context.

21 JUSTICE KAGAN: But I think Mr. Landau's
22 point -- it was a strong part of his brief, I think --
23 was that there was no reason why his clients would have
24 thought that they had a disclosure obligation in the
25 first place. So, it wasn't like they were looking at

1 this disclosure obligation and saying we don't feel like
2 it. They were saying we're not covered by it.

3 MR. WALL: That just goes to Justice
4 Ginsburg's point, I think, which is that where a
5 plaintiff can sufficiently plead a section 16(b) case at
6 the motion to dismiss stage to survive dismissal under
7 Iqbal and Twombly, everyone agrees that if you've got a
8 16(b) potential violation, you've got a reporting duty
9 under 16(a). You can't have liability for a trade under
10 (b) that you weren't required to report under (a).

11 So, if the plaintiff can sufficiently plead
12 a case at the motion to dismiss stage under 16(b), by
13 definition the plaintiff has sufficiently pleaded that
14 the defendant violated a reporting obligation under (a).

15 JUSTICE ALITO: Well, no. Why is that true?
16 Somebody could be a -- an insider without knowing that
17 the person was an insider.

18 MR. WALL: That's right. But section 16(a),
19 except for the criminal sanctions, is a strict liability
20 provision. If you're an insider and you fail to file,
21 you've violated 16(a). Now, you know, it's a separate
22 question on 16(b), but the -- I think everyone here
23 agrees that if you have a violation of (b), you
24 necessarily have a violation of (a). You can't be
25 forced to disgorge the profits from a trade you weren't

1 required to report.

2 JUSTICE ALITO: No, I understand that, but I
3 thought the point was -- I thought the question was
4 whether there is the kind of concealment that would
5 invoke equitable tolling when the concealment is not
6 done knowingly, when it is not done in -- in knowing
7 breach of a disclosure obligation.

8 MR. WALL: I think the -- the breach of a
9 duty, a statutory or a common law duty, especially where
10 that duty is designed to aid in the enforcement of a
11 private right of action, is and has been considered by
12 courts to be concealment. Without looking at whether
13 the fiduciary just accidentally or inadvertently --

14 JUSTICE BREYER: There are two different
15 doctrines, I gather. One is equitable -- equitable
16 tolling. The other is sometimes called equitable
17 estoppel or fraudulent concealment. But -- whatever you
18 call them, if you take your position, a person who
19 really thinks he doesn't have to file and so he doesn't
20 file will be liable forever. There will be no statute
21 of limitations because the plaintiff will never find
22 out. Maybe 50 years later. All right?

23 If you take the opposite position, then you
24 will prevent plaintiffs in borderline cases from
25 bringing suits because they aren't going to find out

1 that somebody thinks it's a borderline case. I see one
2 harm one way, one harm the other way. You're arguing
3 that the second harm is the worst harm. Okay, why?
4 What's the argument?

5 MR. WALL: Justice Breyer, I just -- I want
6 to fight the premise --

7 JUSTICE BREYER: No, I'm making it for
8 you -- I'm making your argument. I'm trying to.

9 (Laughter.)

10 JUSTICE BREYER: I'm saying it's something
11 on your side and something the other side. He's arguing
12 you're wrong because if there's no bad conduct by the
13 defendant, he honestly thinks he doesn't have to file,
14 then the statute never runs. Okay?

15 MR. WALL: We have occupied the --

16 JUSTICE BREYER: But on the other hand, his
17 position leads to the plaintiff never being able to sue
18 in borderline cases. Which is worse?

19 MR. WALL: You're absolutely right. They
20 are both bad. We've occupied the reasonable middle
21 ground. Hope you like it.

22 (Laughter.)

23 JUSTICE SCALIA: Thank you, Mr. Wall.
24 That's a nice note on which to end.

25 Mr. Tilden, we will hear from you.

1 ORAL ARGUMENT OF JEFFREY I. TILDEN

2 ON BEHALF OF THE RESPONDENT

3 MR. TILDEN: Justice Scalia, and may it
4 please the Court:

5 The underwriters' argument, and the
6 Government's for that matter, are founded on the notion
7 that Congress wanted someone who violated 16(a) to
8 receive the benefit of the statute of limitations or
9 repose in 16(b).

10 16(b) is unique in the securities law and
11 perhaps in the law generally, in that the plaintiff
12 suffers no injury and recovers no damages. There is no
13 triggering event, unlike a fraud case, your stock drops,
14 to suggest that you've been harmed. 16(b) is 99 percent
15 of the time irrelevant without a 16(a) filing. As a
16 matter of logic, it makes no sense to provide that one
17 who violates 16(b) can escape liability because they
18 also violate 16(a).

19 JUSTICE ALITO: Well, what about as a matter
20 of language, whether or not 16(b) is a -- whether it's a
21 statute of repose or a statute of limitations, it tells
22 you exactly when the time is supposed to begin to run,
23 from the -- from the realization of the profit? And you
24 want to say no, it doesn't begin to run from that point;
25 it begins to run from the point when some other

1 completely different external event occurs, if it ever
2 does occur, which is the filing of the 16(a) report.
3 Textually, how do you get to that?

4 MR. TILDEN: We get here -- get there this
5 way, Your Honor: The Court several times recognized
6 that 16(b) and 16(a) were interrelated. The limitations
7 period in (b) provides, in the second sentence, "such
8 profit" and "no such suit for such profit." Well, what
9 profit and what suit are those?

10 To answer that question, we must go to the
11 first sentence which refers to the profit of such
12 beneficial owner, director, and officer. Who are they?
13 To know that, we must go to 16(a), which is a
14 single-sentence statutory command that directs
15 beneficial owners of more than 10 percent, directors,
16 and officers to file the form provided for below. 16(b)
17 is a statute of limitations for those who file the form.

18 There is no statute of limitations in 16(b)
19 for those who do not. The statute of repose contended
20 for by the underwriters here would have this unique
21 feature: It would run invisibly to all but the
22 defendant. No one else has any notice the clock is
23 ticking but the defendant. This has a -- an
24 attractiveness if you're the defendant, but it doesn't
25 work well for the rest of us. No knowledge of a

1 triggering event and its running in the face of an
2 affirmative statutory duty --

3 JUSTICE KAGAN: But I think you're arguing
4 against the most extreme position. Another position is
5 just, regardless whether there's been a filing, if the
6 person knew or should have known, if a reasonable person
7 would have known, even if there were no filing, that's
8 enough.

9 MR. TILDEN: Your Honor, the -- there are
10 several responses to that. 16(a) we believe is the
11 discovery rule. Congress looked at this and commanded
12 insiders to put the information in a particular location
13 so that shareholders, who have the primary enforcement
14 authority under 16(b), can go find it there.

15 In the face of that congressional dictate,
16 can we graft an appendage onto the statute that says,
17 notwithstanding the fact the shareholder was told that
18 he or she could go look there and notwithstanding the
19 fact that they went to look there and there was nothing
20 there, they must nonetheless go elsewhere? Congress
21 said: Shareholder, go look behind door number 16 to see
22 if the information is there.

23 JUSTICE SCALIA: They need not go elsewhere,
24 but when they have gone elsewhere and have found out --
25 I mean, in this case, it's -- it was not just that you

1 reasonably should have known; it's you did know. Isn't
2 -- am I right about that?

3 MR. TILDEN: No, sir, you're not right.

4 JUSTICE SCALIA: Oh. Okay.

5 MR. TILDEN: We alleged in the claim a -- a
6 conscious agreement between the underwriters and key
7 decisionmakers at the issuer to underprice the IPO.
8 This is extraordinarily counterintuitive behavior. It
9 is not listed, mentioned at all in the IPO filing in
10 '02. Judge Scheindlin's opinion in '03 nowhere refers
11 to "group," "agreement," "contract," "conspiracy."

12 JUSTICE SOTOMAYOR: So, that was the --

13 JUSTICE SCALIA: Is that necessary to your
14 cause of action?

15 MR. TILDEN: A group plainly is. A group
16 is. It's a footnote, Your Honor.

17 JUSTICE SOTOMAYOR: But tell me what was
18 hidden from you in the prior filings in the academic
19 literature that your adversary points to? All of the
20 facts you've just recited have been written about
21 extensively for years and years. So, what new
22 information that you received told you that you should
23 file a lawsuit?

24 MR. TILDEN: Your Honor, I disagree with the
25 premise, but let me work backwards. First, if you -- if

1 we were to apply a vanilla form discovery rule like
2 Merck, knowledge of the particular facts of the
3 transaction, to this day no one has knowledge of the
4 purchase and sales within six months and the profits.
5 Those are elements of a 16 -- I'm sorry -- a 16(b)
6 claim. We lack knowledge.

7 Two, whatever it is a reasonable shareholder
8 ought to do to trigger a Merck-like plain vanilla
9 discovery rule, we have gone far beyond that. We cannot
10 impose on a shareholder the obligation to read the
11 Journal of Financial Management or to follow a Harvard
12 symposium. Three -- and this --

13 JUSTICE SOTOMAYOR: You mean to tell me that
14 somebody's investing in the amounts that are invested
15 here and they're not following the fact that this has
16 been the center of securities litigation for years?

17 MR. TILDEN: Your Honor, this is a -- not a
18 garden-variety 16(b) violation. I agree with you
19 completely regarding our level of involvement, but I do
20 not believe we present a standard 16(b) claim.

21 But to answer directly your question, the
22 group allegation that underwriters and key
23 decisionmakers of the issuer conspired together is not
24 in the IPO -- in the IPO case. The allegation there was
25 this: That the underwriters were getting unrevealed

1 compensation that should have been disclosed. Should
2 have been disclosed and was not. Underwriter
3 compensation. And the allegation against the insiders
4 was that they knowingly or recklessly signed the
5 prospectus. It's at page, I believe, 310 of Judge
6 Scheindlin's opinion.

7 So, that is all that is alleged there.
8 There is no group activity, no notion that this acted in
9 concert -- or that they were acting in concert. The
10 notion that someone would deliberately underprice their
11 IPO first appeared in the scholarly research at a Spring
12 of '09 Harvard symposium a year and a half after we
13 filed our claim.

14 JUSTICE SOTOMAYOR: Could you answer what I
15 consider a very strong argument on their side, which is
16 Congress, who creates a statute of repose for
17 intentional conduct like fraud, why would they not
18 create a statute of repose for what is a strict
19 liability statute?

20 MR. TILDEN: The fraud case is all about --
21 involve, Your Honor, someone who has reason to know that
22 they've been defrauded. It may only be that they bought
23 their stock at X, and now it's selling for half of X,
24 but they know something has happened. There is no
25 equivalent here. The 16(b) plaintiff has suffered no

1 injury. It's critical to an understanding of what the
2 Congress contemplated at the time.

3 JUSTICE SCALIA: One would think, if the
4 16(b) plaintiff has really suffered no injury, it would
5 be all the more likely that Congress would want a
6 statute of repose.

7 MR. TILDEN: I don't believe, Your Honor --
8 the 1934 legislative history made it clear -- makes it
9 clear that Congress was extraordinarily concerned about
10 a broad sweep of misconduct in the '20s. They intended
11 a rule that in this Court's language in Reliance
12 Electric would be flat, sweeping, and arbitrary. They
13 intended to squeeze every penny of profit out of these
14 transactions, and they did so in 16(b).

15 This is not a trap for the unwary. Congress
16 has said you cannot be unwary. If you are an insider,
17 you must be wary. You must be wary. That's what
18 Congress has said.

19 If we are concerned about how this might
20 work going forward -- and the underwriter has raised a
21 parade of horrors: Oh, this is what will happen if
22 the Court adopts our position. One thing we might do if
23 we want to know what will occur in the next 64 or
24 77 years is look backwards at the last 64 or 77 years.
25 The Whittaker rule has been the rule in most of the

1 United States for virtually the entirety of the last
2 77 years.

3 JUSTICE BREYER: It's worked out, but I
4 don't understand it. I mean, why not just treat it like
5 a special -- regular statute of limitations? You say
6 that the profit is made on day one. It was made by an
7 insider, and if your client finds out about it or
8 reasonably should have found out about it, then the
9 statute begins to run.

10 MR. TILDEN: Your Honor --

11 JUSTICE BREYER: Otherwise it's tolled,
12 period. Simple, same as every other statute. What's
13 wrong with that?

14 MR. TILDEN: Well, we don't believe the
15 congressional design contemplated tolling. Congress
16 told shareholders we could go look in a particular
17 place. But here's one other problem with it.

18 JUSTICE BREYER: But there are people, you
19 see, who don't know. There are always borderline cases.
20 Some people, whether it's this one or not, think maybe
21 they don't have to file. They think they're outside the
22 statute. So, they don't. Okay?

23 You are protected. If they don't file, and
24 you wouldn't reasonably find out about it, fine. But
25 when you find out about it or should have, not fine.

1 It's very simple and makes everything logical. It seems
2 to be fair to your client, certainly.

3 MR. TILDEN: It may be simple and fair, Your
4 Honor. We -- we don't believe it's what the language of
5 the statute provides for. It also suffers from this
6 additional defect: Under the statute in this Court's
7 opinion in *Gollust v. Mendell*, the standing requirement
8 for 16(b) is that you own shares at the time of
9 institution of the action. This can be years subsequent
10 to the events themselves.

11 Can we adopt a statute of limitation, a
12 discovery rule that runs against someone who has not yet
13 acquired standing under *Gollust*? I wonder if we can.
14 It seems to me to defeat the special standing that
15 Congress intended 16(b) shareholders to have. You
16 acquire standing on day 700 when you purchase your
17 shares, only to find that you have no claim because you
18 were having imputed to you something that a shareholder,
19 which you were not, knew or should have known 3 years
20 earlier. Could that be --

21 JUSTICE KAGAN: Mr. -- Mr. Tilden, is there
22 any other context in which we would extend the
23 statute -- or we have extended or any court has extended
24 a statute of limitations without requiring that the
25 plaintiff be reasonably diligent? Can you point to any

1 other example of that?

2 MR. TILDEN: I -- I cannot, Your Honor, but
3 I can also not point to a statute of limitations such as
4 this one that follows immediately on an affirmative
5 disclosure obligation imposed on the defendant.

6 To answer a question Justice Alito raised in
7 response to one of my colleagues, I believe the best
8 analysis of the difference between a statute of
9 limitations and a statute of repose by this Court
10 recently is in the Beach v. Ocwen opinion. And in
11 Beach, the Court analyzed the Truth in Lending Act and
12 concluded the language that said 3 years after the
13 transaction the right of rescission shall cease, was a
14 statute of repose. It was completely clear. It did not
15 rely on a discovery rule incorporated therein; it did
16 not require a -- did not rely on a second prong. Beach
17 cites the -- a prominent Harvard Law Review article at
18 63 Harvard Law Review, and is a wonderful analysis of
19 this Court's work on this subject.

20 A kernel of the motivation in the
21 underwriters' briefing is the notion that liability
22 under 16(b) is draconian, that there's -- that it's
23 harsh. It's important to note that all you have to do
24 under 16(b) is give back profit that never belonged to
25 you. In the words of the statute, it inured to the

1 corporation; you weren't entitled to it. It's as if the
2 penalty for bank robbery were that you merely had to
3 give the money back. No attorneys' fees. You don't
4 have to return your principal, you just give the money
5 back.

6 Finally, I'd like to address a difference
7 between the Whittaker decision and the Litzler decision,
8 briefly. Both of these courts found that 16(b) only
9 worked by virtue of 16(a). In Whittaker, the Ninth
10 Circuit said only by full compliance with 16(a) do your
11 16(b) rights mean anything. And in Litzler, the Second
12 Circuit said 16(b) only works because of the absolute
13 duty of disclosure placed on the defendant. We agree
14 with that. We disagree with my buddy, Mr. Landau.

15 Most trading today occurs electronically in
16 the dark of night; it is invisible to everyone else.
17 But if the Court gets to the position where it is
18 debating whether Whittaker or Litzler ought to be the
19 rule --

20 JUSTICE SOTOMAYOR: Or the SG's.

21 MR. TILDEN: -- or the SG's, we'd offer
22 this: There is no reported decision in which Whittaker
23 and Litzler will yield different results in our view.
24 Whittaker is a bright-line rule of the kind Congress
25 intended. Litzler is a rule that in its own words

1 requires conceivably discovery and trial.

2 JUSTICE ALITO: And it requires actual -- is
3 that right? It requires actual knowledge on the part of
4 the plaintiff?

5 MR. TILDEN: Yes, sir.

6 JUSTICE ALITO: Does that make any sense,
7 given the -- the class of individuals who are plaintiffs
8 in 16(b) cases?

9 MR. TILDEN: We don't --

10 JUSTICE ALITO: Somebody who -- who is found
11 for purposes of litigation very often to have purchased
12 his stock long after all of this takes place. So, the
13 lawyer who wants to bring this suit can just go out and
14 find somebody who knows nothing? Isn't that right?

15 MR. TILDEN: The -- there's much I want to
16 say in response to that. The underwriters contended in
17 the lower courts for a subjective rule. No party before
18 this Court contends for a subjective rule. We do not
19 believe that -- Whittaker is not a subjective rule, and
20 I do not believe that Judge Jacobs in Litzler was
21 arguing for a subjective rule.

22 What he envisioned -- he -- the judge had a
23 fair concern in the abstract. He said, look, if they
24 don't file the form but the identical information is
25 available to all the world everywhere else, what's wrong

1 with that? Well, there's nothing wrong with it, except
2 that it's never available to all the world anywhere
3 else. No other securities filings reveal this.
4 Congress told us to go look in one place, and not
5 anywhere else.

6 But the Litzler court I don't think
7 envisioned an actual notice rule. When it said
8 information as clear as 2 plus 2, I believe it was
9 seeking an objective rule, Whittaker-like, looking for
10 Whittaker-equivalent information. We don't believe such
11 a thing exists. That said, the Litzler rule requires
12 discovery in trial.

13 If the rules don't achieve different
14 results, then we have the choice between applying a rule
15 that is just, speedy, and efficient -- Whittaker -- and
16 a rule that is just, slow, and costly -- Litzler. Some
17 version of Occam's Razor, if nothing else, ought to
18 support the application of the Whittaker rule and not
19 the Litzler rule, should the Court find itself in that
20 position.

21 Here's the last thing I'd say, and then I
22 will be quiet. Today is the first time this Court has
23 analyzed the issue before it, but it's come up
24 repeatedly in the lower courts over the last 77 years,
25 and with one exception, 1954, in the Middle District of

1 Pennsylvania, the courts have unanimously rejected the
2 petition -- the position contended for by both the
3 underwriters here and the Government. The rule has been
4 Whittaker or a Litzler variant of it everywhere, all the
5 time.

6 In 1934, the purchase or sale of a share of
7 stock required the actual knowledge of some other
8 people. Today it is an impersonal electronic
9 transaction, often at home in the middle of the night,
10 invisible to everyone. Insider trading was hard enough
11 to uncover then; it's gotten harder now. We do not
12 believe that Congress envisioned any additional burden
13 would be placed on a shareholder by forcing them to
14 learn this undetectable conduct within 2 years.

15 The most, in our view, famous pronouncement
16 by this Court with respect to the interpretation of
17 16(b) is out of the Reliance Electric opinion in 1962.
18 In Reliance, the Court said, faced with a question, two
19 competing interpretations of the statute, the Court
20 should -- should select that interpretation that best
21 serves the congressional purpose of curbing short-swing
22 speculation by insiders.

23 JUSTICE SCALIA: The -- the problem I have
24 with your argument is it's a very strange statute of
25 limitations. Accepting that it is not a statute of

1 repose, it says, you know, you have 2 years after the --
2 the transaction that was failed to be reported.

3 And you want to say what it means is you
4 have 2 years from the time it was reported. Congress
5 would have said that. It's so easy to say that. Two
6 years from the reporting.

7 MR. TILDEN: I grant you it could have been
8 said otherwise, Your Honor, but we --

9 JUSTICE SCALIA: But I don't know any other
10 statute of limitations that achieves the result that you
11 want that puts it that way.

12 MR. TILDEN: Every other statute of
13 limitations we can think of, Your Honor, involves a
14 plaintiff who has reason to know of some harm and,
15 incidentally, recovers damages. The 16(b) plaintiff has
16 no reason to know of harm and recovers no damages.
17 Right?

18 If I -- let's take a case that's seen every
19 day and every month, probably in every State in the
20 country. A lawnmower accident and a child or a teenager
21 loses a toe. You may not know anything about lawnmower
22 design. You may not know anything about your State's
23 product liability act or ANSI standards or the litany of
24 duty breach, causation, and damages, but you do know
25 that you used to have ten toes and now you have nine.

1 There is no equivalent. The 16(b) plaintiff
2 does not know insider trading has occurred and won't
3 know unless he or she is told. They do not know if
4 someone else somewhere has nine toes. As far as they
5 know, everybody still has all of their toes.

6 No other statute of limitations will serve
7 as an analogue here because of the unique character of
8 16(b). The plaintiff has no injury and recovers no
9 damages. We don't believe we can fairly look at other
10 statutes of limitation as a model, given that
11 distinction.

12 The Reliance Electric court concluded if --
13 if you have a choice, you should select that
14 interpretation that best serves the goal of curbing
15 short-swing trading by insiders.

16 We believe the -- the case before the Court
17 can and should be determined based on the wording of
18 16(b) itself. The limitations period in (b) applies to
19 those who file the form in (a). But if the Court
20 believes that the textual analysis is less clear than we
21 think, the Ninth Circuit should be affirmed based on the
22 interpretive principles of Reliance Electric,
23 nonetheless.

24 If there are no other questions, I'll sit
25 down.

1 JUSTICE SCALIA: Thank you, Mr. Tilden.

2 Mr. Landau, you have 4 minutes.

3 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

4 ON BEHALF OF THE PETITIONERS

5 MR. LANDAU: Thank you, Your Honor. Very
6 briefly, just on repose, two quick points.

7 If there's any one theme that runs through
8 this Court's 16(b) jurisprudence, it's that precisely
9 because the -- section 16(b) is prophylactic, it should
10 be interpreted in a literal and mechanical way. I think
11 the -- that argues for repose, because you don't get
12 into a lot of these questions about who knew what when.
13 And so, that certainly would be consistent with -- this
14 case would fit well within that -- that tradition, if
15 you were to go that way.

16 In addition on repose, let's not forget that
17 Congress gave 2 years after the date the profits were
18 realized. If those profits were in a report, you
19 wouldn't need the whole 2 years, anyway. In fact, for
20 the fraud provision, you only get 1 year after you
21 discover it. So, in a sense, I think that helps show
22 that even in a repose approach, 2 years is plenty of
23 time.

24 Then -- but assuming that you go with
25 equitable tolling, I think -- I'd like to emphasize that

1 there's really four approaches that have been brought
2 forth. There's the Ninth Circuit's rigid approach that
3 it's -- they call it equitable tolling, but there's
4 really nothing equitable about it. It's -- it's we
5 don't care about who knew what, when, or anything. It
6 is you have to file the 16(a).

7 The district court actually struggled
8 because the district court in this case said I'm
9 supposed to be doing something called equitable tolling,
10 and there's nothing equitable here at all, because I
11 think everything here was plainly known to the -- to the
12 plaintiffs or should have been known.

13 Then you have the Litzler approach, which
14 looks to actual knowledge. And I think, as some of the
15 questioning brought out, there is no background rule
16 that distinguishes between actual knowledge and
17 constructive knowledge for purposes of equitable
18 tolling.

19 Again, I think as some of the questions
20 brought out, equitable tolling, because it's an
21 equitable doctrine, looks to has the defendant behaved
22 equitably and has the plaintiff behaved equitably?

23 And we agree with the Government that
24 diligence -- in other words, would a reasonable
25 shareholder -- did a shareholder know or would a

1 reasonable shareholder should have known -- is a
2 critical part of the inquiry that's missing in -- in the
3 Ninth Circuit's analysis.

4 Where we disagree with the Government is
5 with respect to their -- their view of fraudulent
6 concealment to involve any violation -- any alleged
7 violation of a statutory 16(a) duty. Under the
8 Government's view, it would be considered fraudulent
9 concealment and would -- would give rise to tolling if
10 somebody were to come in today and say, gee, the
11 Microsoft IPO back in 1986, there was actually a group
12 in there, the underwriters conspired. And -- you know,
13 the thing is the difference between this case and that
14 one is this case happens to have involved this hugely
15 prominent IPO litigation that really brought all these
16 things to light, but the -- the defendant in that
17 Microsoft hypothetical would not have the advantage of
18 being able to point to the defendant's -- to the
19 plaintiffs' lack of diligence, saying this is all out
20 there.

21 So, you'd be creating a regime, if you go
22 with the Government's approach, that really waters down
23 the defendant's culpability on the fraudulent
24 concealment side of equitable tolling. Essentially,
25 they're asking you to take the fraud out of fraudulent

1 concealment.

2 The only last point I'd like to make is
3 that, with respect to the specific facts here again,
4 counsel said today that this was not known until a
5 Harvard symposium in 2009. I would urge you, again, to
6 look at their briefing below. Their -- docket 58 in the
7 district court responds to our motion to dismiss by
8 citing a 2004 article that they actually included in the
9 joint appendix. You can look at joint appendix 80 to
10 83. Their theory of underwriter conspiracy with issuer
11 insiders is set forth right there on those pages of that
12 2004 article, well before the 2 years.

13 And, again, in addition, the 2000 -- their
14 complaint, which talks about lock-up, you can look
15 specifically at joint appendix 59 to 61 to see how
16 lock-up was alleged to be a critical part of their
17 underlying theory.

18 Finally, it is not true, again, that the IPO
19 litigation was only about underwriters. There were
20 individual issuer defendants at issue in the IPO
21 litigation. And, in fact, Judge Scheindlin's opinion
22 goes into some detail about the -- the alleged
23 conspiracy that they're saying -- the alleged group that
24 they're saying they couldn't have found out.

25 In fact, she says -- this is -- pages 356

1 and 358 of the Judge Scheindlin opinion will provide
2 quotations that show that their theory was very well
3 known. Thank you.

4 JUSTICE SCALIA: Thank you, Mr. Landau.

5 The case is submitted.

6 (Whereupon, at 12:01 p.m., the case in the
7 above-entitled matter was submitted.)

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