No. 24-

IN THE

Supreme Court of the United States

JOSEPH MONA,

Petitioner,

v.

MICROBOT MEDICAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 22, 2025

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QUESTIONS PRESENTED

An elderly man's retirement savings are now in peril because a company was found to have Article III standing to maintain an action against him for the disgorgement of nearly a half-million dollars of short-swing profits under Section 16(b) of the Securities Exchange Act of 1934 ("Section 16(b)") even though it did not allege or suffer actual injury because of his trading activity in its stock and despite that he indisputably was a faultless, unsophisticated shareholder that had no affiliation with it and no inside information. This imminent threat results from a scheme perpetrated by a cadre of attorneys to solicit repeat "investors" for the purpose of engaging in an ongoing enterprise of Section 16(b) litigation against unsuspecting victims. Not only does Section 16(b) effectively strip a corporate board of its business judgment to decline to bring a disgorgement action when demanded by any purported shareholder, as occurred in this case, it also does not include the continuous and contemporaneous ownership requirements applicable in typical shareholder derivative actions. The consequence is that a plaintiff can purchase a company's securities after alleged short-swing trades solely to bring a Section 16(b) action. That is the situation here.

The question presented is:

Whether an issuing corporation that neither alleged nor suffered actual injury has Article III standing to maintain an action for the disgorgement of short-swing profits, as defined by Congress and arising from the mere violation of Section 16(b).

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 14.1(b)(iii) STATEMENT

This case directly relates to these proceedings:

Microbot Medical, Inc. v. Mona, No. 19 Civ. 3782 (GBD) (RWL), United States District Court for the Southern District of New York (memorandum decision and order denying motion to vacate judgment and to dismiss case for lack of standing under Article III of the United States Constitution entered March 5, 2024); and

Microbot Medical, Inc. v. Mona, No. 24-559-cv, United States Court of Appeals for the Second Circuit (summary order affirming district court judgment entered January 22, 2025).

No other proceedings in state or federal trial and appellate courts, including proceedings in this Court, directly relate to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Mona respectfully petitions for a writ of certiorari to review the summary order and judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's summary order is unreported. (App. 1a-4a.) The memorandum decision and order of the United States District Court for the Southern District of New York is also unreported. (App. 5a-17a.)

JURISDICTION

The Second Circuit entered its summary order and judgment on January 22, 2025. (App. 1a.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1, provides, in part, that federal jurisdiction is limited to "Cases" and "Controversies." Section 16(b) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78p(b), provides in part: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer … within any period of less than six months … shall inure to and be recoverable

by the issuer.…" Section 28(a) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78bb(a), provides in part: "No person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in 1 or more actions, a total amount in excess of the actual damages to that person on account of the act complained of." These provisions are reproduced in full in App. 99a-103a.

STATEMENT OF THE CASE

A. Introduction.

This petition presents a fundamental question of federal subject-matter jurisdiction—whether Article III permits courts to hear suits for "short-swing profits" under Section 16(b) of the Securities Exchange Act of 1934 ("Section 16(b)," "Exchange Act") without concrete injury. The law on this question was settled in the Second Circuit by *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170 (2d Cir. 2012) ("*Donoghue*"), which held that the mere violation of Section 16(b), characterized as a breach of fiduciary duty, is sufficient to confer Article III standing on the issuing corporation, and *Packer ex rel. 1-800-Flowers.Com, Inc. v. Raging Capital Management, LLC*, 105 F.4th 46 (2d Cir. 2024) ("*Packer*"), which concluded that *Donoghue* remains controlling law despite this Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) ("*TransUnion*"). The Second Circuit reaffirmed *Donoghue* and *Packer* in its decision below, which found that an issuing corporation that neither alleged nor suffered actual injury has Article III standing to maintain a Section 16(b) claim against an innocent, noncontrolling shareholder that has no affiliation with it or

inside information and upheld the resulting disgorgement award in the amount of $484,614.30.

Contrary to *Donoghue*, *Packer*, and the decision below, a statutory violation alone, however labeled, is insufficient to establish Article III standing under this Court's jurisprudence. Rather, a statutory violation and "concrete harm" are essential to demonstrate the injury-in-fact required for Article III standing. A plaintiff's inability to allege concrete harm in addition to a statutory violation precludes Article III standing, along with subject-matter jurisdiction, because an injury-in-law is not an injury-in-fact. As this Court decreed: "'Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules,'" but "'Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.'" *Gollust v. Mendell*, 501 U.S. 115, 122 (1991) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

Yet, in its decision below, the Second Circuit summarily rejected arguments that Article III standing to maintain a Section 16(b) claim was lacking because "actual damages" had not been alleged or suffered as required by Section 28(a) of the Exchange Act ("Section 28(a)"), disgorgement is not available under Section 16(b) when the issuing corporation has not suffered pecuniary harm, and a Section 16(b) claim is not analogous to common-law breach of fiduciary duty for purposes of Article III standing when the issuing corporation has failed to plead the essential element of damages. Because the Second Circuit's disposition of these vital issues conflicts with decisions of this Court, other circuits, and even its own precedents, the interests of justice compel the granting

of review to ensure uniformity in Article III standing doctrine and federal securities law.[1]

B. Statutory Purpose Of Section 16(b).

Congress enacted Section 16(b) to prevent "'unfair use of information'" by statutory insiders who might obtain it "'by reason of [their] relationship to the issuer'"—a situation wholly absent here. *Kern Cnty. Land Co. v. Occidental Petroleum Co.*, 411 U.S. 582, 591 (1973) (quoting 15 U.S.C. § 78p(b)). Recognizing that such an insider "could exploit information not generally available to others to secure quick profits," Congress anticipated that "shortswing speculation by stockholders with advance, inside information would threaten the goal of the Securities Exchange Act to 'insure the maintenance of fair and honest markets.'" *Id.* at 591-92 (quoting 15 U.S.C. § 78b). Congress therefore sought to "'curb the evils of insider trading'" by "'taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great.'" *Foremost-McKesson,*

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1. Petitioner respectfully suggests that the Court may wish to request the views of the Securities and Exchange Commission ("SEC") as amicus curiae. The SEC does not typically submit amicus curiae briefs at the certiorari stage unless requested by the Court. The SEC's perspective would be particularly valuable given that in *Packer*, the agency cited *Gollust* but failed to address this Court's explicit recognition that "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Gollust*, 501 U.S. at 122. *See* Brief of the SEC as Amicus Curiae Supporting Plaintiff-Appellant, at 5, 13, *Packer*, 105 F.4th at 46 (No. 23-367), 2023 WL 4863326. The SEC's current views on this fundamental Article III question would significantly aid the Court's consideration of this petition.

Inc. v. Provident Sec. Co., 423 U.S. 232, 243 (1976) (quoting *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S., 418, 422 (1972)). The congressional hearings that preceded the Exchange Act's passage indicate that Section 16(b) "was designed to protect the 'outside' stockholders against at least short-swing speculation by insiders with advance information." *Smolowe v. Delendo Corp.*, 136 F.2d 231, 235 (2d Cir. 1943).

To achieve this goal, Congress codified in Section 16(b) an "'objective standard'" that "'imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation.'" *See Reliance Elec.*, 404 U.S. at 422 (quoting *Bershad v. McDonough*, 428 F.2d 693, 696 (7th Cir. 1970)); *see also* S. REP. NO. 73-792, at 9 (1934) ("[t]he bill further aims to protect the interests of the public by preventing directors, officers, and principal stockholders of a corporation, the stock of which is traded in on exchanges, from speculating in the stock on the basis of information not available to others"). Congress identified "directors, officers, and beneficial owners as those presumed to have access to inside information" and imposed a "flat rule" under which the corporation could recover statutorily-defined "profits" from them. *See Foremost-McKesson,* 423 U.S. at 243-44; *see also Blau v. Lehman*, 368 U.S. 403, 410 n.10 (1962) ("[a]n 'insider' for purposes of § 16 is an officer, director or 10% stockholder").

Section 16(b) "'maximize[s] its deterrent effect'" by providing that "'whenever a director, officer or owner of ten percent or more of any class of an issuer's securities purchases and sells equity securities of that issuer within

a six-month period, he must return any profits he realizes to the issuer'" with no other "'prerequisites or postulates to liability.'" *Frankel v. Slotkin*, 984 F.2d 1328, 1337 (2d Cir. 1993) (quoting *Newmark v. RKO Gen., Inc.*, 425 F.2d 348, 351 (2d Cir. 1970)). Under its provisions, Section 16(b) "requires that 'any profit' derived from the matching of any purchase and any sale of a corporation's securities occurring within six months of each other must be disgorged, irrespective of the insider's actual knowledge or intent or whether overall trading during that six months (*i.e.*, all sales and purchases combined) resulted in a loss." *See Steel Partners II, L.P. v. Bell Indus., Inc.*, 315 F.3d 120, 123 (2d Cir. 2002). Unlike most federal securities laws, Section 16(b) "does not confer enforcement authority on the Securities and Exchange Commission," but rather it is "the security holders of an issuer who have the ultimate authority to sue for enforcement of § 16(b)." *Gollust*, 501 U.S. at 122. A security holder may sue to recover a statutory insider's short-swing profits for the issuer if "the issuer declines to bring a § 16(b) action within 60 days of a demand by a security holder, or fails to prosecute the action 'diligently.'" *Id.* (quoting 15 U.S.C. § 78p(b)).

C. Proceedings And Rulings Below.

On April 28, 2019, Respondent Microbot Medical, Inc. ("Microbot") commenced this action in the district court pursuant to Section 16(b) by filing a complaint against Alliance Investment Management Ltd. ("Alliance") after receiving a demand on behalf of a purported Microbot shareholder, Mark Rubenstein. Microbot subsequently filed a first amended complaint against Alliance and a second amended complaint against Alliance and Petitioner Joseph Mona ("Mona"). After the district court granted

Alliance summary judgment, the action proceeded solely against Mona for the disgorgement of alleged short-swing profits under Section 16(b).

Nowhere in its pleadings did Microbot allege that Mona harmed it or its investors. Microbot instead maintained that it had no need to prove actual harm to state a claim for relief under Section 16(b). Characterizing Section 16(b) as a non-punitive "strict liability statute," Microbot alleged that it "must prove only that a defendant was an insider of a public company whose securities were registered under Section 12 of the Act or any subdivision thereof who profited from the purchase and sale of the company's securities within a period of less than six months." According to Microbot, "[e]vidence of the defendant's intent, misuse of information, or bad faith is irrelevant and not required" and that "insiders are simply required to disgorge profits retained in violation of the Act." Microbot did not allege that Mona was an officer or director of the company, had access to non-public information about the company, or benefited from any advantage in his trading of Microbot stock relative to other shareholders, but rather alleged that Mona was a "statutory insider" under Section 16(b) because he purportedly became a "beneficial owner" of more than ten percent of its outstanding common stock at some time. Mona denied liability, asserting that he actually sustained significant losses on his trades of Microbot stock and that Microbot's punitive demand for disgorgement of "implied short-swing profits" under Section 16(b) did not account for his actual net realized losses.

Nonetheless, on March 30, 2021, the district court entered an order adopting the magistrate judge's report

and recommendation that Microbot's motion for judgment on the pleadings be granted and a judgment in the amount of $484,614.30 be entered against Mona under Section 16(b). Describing Section 16(b) as a "'crude,' 'harsh,' and 'Draconian' strict liability regime" where "'an individual may be charged with a Section 16(b) 'profit' even when his or her relevant trading actually resulted in a substantial financial loss' – just as is the case here," the report and recommendation concluded that Section 16(b) requires "disgorgement" of "short-swing profits" as a "separate and independent remedy from any damages that may be available to an issuer seeking redress for insider misconduct." (App. 62a, 68a.) Accordingly, the district court entered judgment against Mona in the amount of $484,614.30. (App. 36a-37a.)

Mona thereafter unsuccessfully challenged the district court's subject-matter jurisdiction. On April 12, 2023, pursuant to Rules 12(b)(1), 12(h)(3), and 60(b) of the Federal Rules of Civil Procedure, Mona moved the district court to vacate its March 30, 2021 order granting Microbot judgment on the pleadings under Section 16(b) and to dismiss Microbot's claims. Mona argued that Microbot lacked Article III standing under Section 16(b) because it neither alleged nor demonstrated concrete harm. Mona contended that *TransUnion* effectively overruled the Second Circuit's controlling precedent at the time, *Donoghue*, 696 F.3d at 170, which held that a Section 16(b) violation confers Article III standing by mischaracterizing the violation as an actual injury. On March 5, 2024, however, the district court adopted the magistrate judge's report and recommendation that Mona's motion be denied, ordering that Microbot has Article III standing and that subject-matter jurisdiction exists. (App. 5a-17a, 18a-35a.)

The district court concluded that Section 16(b) imposes "'a form of strict liability'" that "applies even to those who might have violated it inadvertently" and relied on *Donoghue*'s holding that "'short-swing trading in an issuer's stock by a 10% beneficial owner … causes injury to the issuer sufficient for constitutional standing.'" (App. 10a.) Based on *Donoghue*, the district court explained that "the violation of § 16(b) constitutes a breach of statutorily-imposed fiduciary duty and thereby results in a constructive trust containing the profits reaped from the violation" and that the "issuer has a legal right to the profits contained in the constructive trust." (*Ibid.*) The district court further resolved that *Donoghue* still controlled Article III standing for Section 16(b) disgorgement actions after *TransUnion*, reasoning that *Donoghue* "determined that § 16(b) plaintiffs suffer concrete harm analogous to 'the common law injury of breach of trust'" and that it therefore is "compatible with *TransUnion*'s requirement that a plaintiff has suffered a harm with 'a close historical or common-law analogue.'" (App. 14a.) Reiterating that Section 16(b) imposes strict liability, the district court held that Microbot "suffered a concrete harm" because it "has been deprived of" Mona's "profits reaped from his short-swing trading of Plaintiff's stock in violation of § 16(b)." (App. 16a.) Mona timely appealed to the Second Circuit.

On January 22, 2025, the Second Circuit entered a summary order affirming the district court's order denying Mona's motion to dismiss for lack of subject-matter jurisdiction based on Microbot's lack of Article III standing. (App. 1a-4a.) Quoting *Donoghue*, 696 F.3d at 180, the Second Circuit stated that it "has categorically held that 'short-swing trading in an issuer's stock by

a 10% beneficial owner in violation of Section 16(b) of the Securities Exchange Act causes injury to the issuer sufficient for constitutional standing.'" (App. 3a.) In addition, the Second Circuit reaffirmed its recent holding in *Packer* that *Donoghue* "remains good law" despite *TransUnion*, observing that "'[t]he concrete injury that confers standing [on plaintiffs' Section 16(b) claims is] the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock." (*Ibid.*, internal quotation marks omitted.) Because the parties did not dispute that Mona was a "'statutory insider' who 'purchased and sold Microbot stock within a six-month period,'" the Second Circuit concluded that it was bound by *Packer* and *Donoghue*, rejected Mona's remaining arguments without discussion, and affirmed the district court's judgment in its entirety. (App. 3a-4a.)

REASONS FOR GRANTING THE PETITION

The Second Circuit's extraordinary decision contravenes this Court's Article III jurisprudence by holding that a corporation with no injury has standing to seek disgorgement under Section 16(b) against an innocent shareholder with no inside information. This conflicts with holdings of this Court and other circuits, transforming Section 16(b) from a prophylactic measure into a trap for faultless investors and a windfall for unharmed issuers.

The Second Circuit below decided substantial questions of Article III standing and their relationship to federal securities law that have not been, but should be, settled by this Court. Previously, the Court determined "who" has standing to enforce Section 16(b) in federal

court. *See Gollust*, 501 U.S. at 121. Left unanswered by *Gollust* was the showing required to demonstrate that Article III standing exists to enforce Section 16(b). Granting review will enable the Court to resolve this crucial issue and establish needed uniformity in Article III standing doctrine and federal securities law.

I. Recognition That The Violation Of Section 16(b) Alone Satisfies The Injury-In-Fact Requirement For Article III Standing Raises An Important Question Of Subject-Matter Jurisdiction.

The untenable premise of the Second Circuit's decision below is that a plaintiff could maintain a claim in federal court for the alleged violation of a right created by Congress and protected by statute without regard to concrete injury. Relying on its precedents in *Donoghue* and *Packer*, the Second Circuit essentially declared that, by congressional fiat, the mere violation of Section 16(b) is sufficient to confer Article III standing on the issuing corporation to pursue a disgorgement action against a faultless shareholder. This declaration undermines the separation of powers, which Article III standing preserves, by ignoring the constitutional limitations on federal jurisdiction and purporting to create subject-matter jurisdiction where none exists. *See Raines v. Byrd*, 521 U.S. 811, 820 (1997).

"Subject-matter jurisdiction" is defined as a court's "statutory or constitutional power to adjudicate the case." *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). Article III limits the exercise of judicial power by federal courts to "cases" or "controversies." *See* U.S. Const., art. III, § 2, cl. 1. According to the Court,

Article III standing is "perhaps the most important" of the "case-or-controversy doctrines" that impose "fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Article III standing "imports justiciability" because "whether the plaintiff has made out a 'case or controversy' between himself and the defendant" under Article III "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. "As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99. Federal jurisdiction "can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Id.* at 499 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

Because the plaintiff is the party invoking federal jurisdiction, he or she has the burden to establish standing. *TransUnion*, 141 S. Ct. at 2207. Known as the "irreducible constitutional minimum of standing," Article III standing has three elements. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The plaintiff must demonstrate that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* This Court has long recognized that, "[s]ince they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and

degree of evidence required at the successive stages of the litigation." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Second Circuit below should have begun and ended its Article III standing inquiry with injury-in-fact, which this Court has described as the "'[f]irst and foremost' of standing's three elements," because no actual injury had been alleged or sustained. *See Spokeo*, 578 U.S. at 338-39 (quoting *Steel Co.*, 523 U.S. at 103).

To plead an injury-in-fact, a plaintiff must allege "'that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *See id.* at 339 (quoting *Lujan*, 504 U.S. at 560). For Article III standing, "[a]n injury in fact must be 'concrete,' meaning that it must be real and not abstract." *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1556 (2024); *see also Spokeo*, 578 U.S. at 340 (a "'concrete' injury must be 'de facto'; that is, it must actually exist"). A concrete injury is essential for Article III standing "even in the context of a statutory violation." *Spokeo*, 578 U.S. at 341.

The Second Circuit overlooked that Congress "may not simply enact an injury into existence," as it sought to accomplish through its enactment of Section 16(b), and federal courts "'cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so.'" *See TransUnion*, 141 S. Ct. at 2205 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020)). Rather, Congress might "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," but the "[[s]tatutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from

abandoning the requirement that the party seeking review must himself have suffered an injury." *See Lujan*, 504 U.S. at 578 (insertions in original, quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)). "In no event … may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' [citation], that is likely to be redressed if the requested relief is granted." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth*, 422 U.S. at 501). Accordingly, the Court has "rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo*, 578 U. S. at 341.)

Based on these principles, federal courts must "independently decide whether a plaintiff has suffered a concrete harm under Article III" even when Congress has created a statutory prohibition, obligation, or cause of action, such as the presumed insider trading and disgorgement provisions of Section 16(b). *See TransUnion*, 141 S. Ct. at 2205. The Second Circuit, however, abdicated this duty by disregarding Microbot's failure to plead an injury-in-fact and overlooking that the mere violation of a statute like Section 16(b) is insufficient to establish the concrete harm required for an injury-in-fact. *See TransUnion*, 141 S. Ct. at 2190, 2205; *see also Baysal v. Midvale Indem. Co.*, 78 F.4th 976, 979 (7th Cir. 2023) ("*Spokeo* and *TransUnion* reject the proposition that Congress can create standing just by requiring payment in the absence of an injury," such as providing for "an award of 'liquidated damages' when actual damages cannot be shown"). Rather than undertake the Article

III standing analysis prescribed by this Court, the Second Circuit contravened constitutional separation of powers by deferring to Congress to define when conduct becomes a "concrete" injury. *Id.* at 2207. These errors were dispositive given that Mona's trading in Microbot's stock did not, and could not, cause an injury-in-fact. Because Microbot's lack of Article III standing based on the absence of an injury-in-fact renders the underlying judgment void as a matter of law, the Second Circuit manifestly erred in affirming the denial of Mona's motion to vacate that judgment and dismiss all claims for lack of subject-matter jurisdiction.

For these reasons, the Court should grant review to resolve this vital question of subject-matter jurisdiction by clarifying Article III standing for claims based on statutory violations. This case provides an ideal vehicle to build upon the Court's recent standing jurisprudence in *TransUnion* and *Spokeo*. While this clarification is essential for the proper adjudication of Section 16(b) claims, its effects would not be limited to cases arising under federal securities law, but rather would extend to all statutes in which Congress purports to create Article III standing and thus subject-matter jurisdiction. Specific to federal securities law, however, the grant of review will enable the Court to resolve additional crucial issues, discussed *infra*, relating to Article III standing under Section 16(b).

A. The Second Circuit's Holding That The Mere Violation Of Section 16(b) Results In A Concrete Injury Sufficient To Confer Article III Standing On An Issuing Corporation That Neither Alleged Nor Suffered Actual Damages Conflicts With Section 28(a) And The Decisions Of This Court, Other Circuits, And Even The Second Circuit.

To reach its decision below, the Second Circuit had to disregard Congress's statutory definition of concrete harm for claims arising under the Exchange Act, including Section 16(b). Courts need look no further than the plain language of Section 28(a) to find that Congress expressly limited recovery under the Exchange Act to statutory violations that resulted in "actual damages." Yet, in *Donoghue*, *Packer*, and this case, the Second Circuit did not even mention Section 28(a), which provides:

> No person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in 1 or more actions, a total amount in excess of the actual damages to that person on account of the act complained of.

See 15 U.S.C. § 78bb(a)(1). This omission stands in stark contrast to the Second Circuit's longstanding recognition that "the purpose of section 28(a) is to compensate civil plaintiffs for economic loss suffered as a result of wrongs committed in violation of the 1934 Act, whether the measure of those compensatory damages be out-of-pocket loss, the benefit of the bargain, or some other appropriate standard." *See Osofsky v. Zipf*, 645 F.2d 107, 111 (2d Cir.

1981); *see also Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303, 1313-14 (2d Cir. 1977) (damages under the Exchange Act cannot exceed "actual damages"). The Second Circuit's holding that Microbot's mere allegation that Mona violated Section 16(b) was sufficient to establish the concrete harm required for Article III standing accordingly fails under its own prior interpretation of Section 28(a).

Not only has the Second Circuit diverged from its own settled precedent, its disregard of Section 28(a) conflicts with the decisions of this Court and other circuits. Because "Congress did not specify what was meant by 'actual damages'" in Section 28(a), it is "appropriate" to consider "'the state of the law at the time the legislation was enacted' for guidance in defining the scope of this limitation.'" *See Randall v. Loftsgaarden*, 478 U.S. 647, 662 (1986) (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982)). Notably, "[a]lthough the term 'actual damages' is not defined in the statute itself," the Second Circuit found that "it had an accepted meaning when the Securities Exchange Act was enacted in 1934." *Osofsky*, 645 F.2d at 111. At the time, this Court defined "actual damages" to mean "compensatory damages":

> Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with

> the injury suffered, neither more nor less, whether the injury be to the person or estate of the complaining party.

Birdsall v. Coolidge, 93 U.S. 64, 64 (1876). Actual damages therefore are not presumed, but rather must be "proven by competent evidence in the record." *See FAA v. Cooper*, 566 U.S. 284, 313 (2012) (Sotomayor, J., dissenting); *see also Doe v. Chao*, 540 U.S. 614, 621 (2004) ("presumed damages" consist of "a monetary award calculated without reference to specific harm"); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970) ("damages should be recoverable only to the extent that they can be shown").

Consistent with this definition, this Court has observed that "some courts have construed 'actual damages' in the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), to mean 'some form of economic loss.'" *See Cooper*, 566 U.S. at 293 (citing the Fifth and Ninth Circuits). To date, these courts include the Fifth, Ninth, and Eleventh Circuits. *See, e.g., Pelletier v. Stuart-James Co.*, 863 F.2d 1550, 1557 (11th Cir. 1989) ("'[a]ctual damages' has been interpreted to mean some form of economic loss"); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) ("only actual damages can be recovered under the Securities Acts"; "[a]ctual damages mean some form of economic loss"); *Herpich v. Wallace*, 430 F.2d 792, 810 (5th Cir. 1970) (under Section 28(a), "damages is economic injury to the plaintiff resulting proximately from the acts of the defendants"). The disgorgement award affirmed by the Second Circuit does not constitute "actual damages" as defined by these circuits because it does not compensate Microbot for economic loss, but instead unjustly enriches Microbot as an uninjured issuing corporation at the expense of a faultless shareholder.

Even the Second Circuit has recognized that, in the context of an action brought to recover alleged short-swing profits under Section 16(b) when the issuing corporation has sustained no economic loss, "any 16(b) award to the corporation is essentially a windfall, since the corporation has suffered no harm for which it is being recompensed." *See Blau v. Rayette-Faberge, Inc.*, 389 F.2d 469, 474 (2d Cir. 1968). The "windfall seems even greater" here, where Microbot "was about to sleep on its rights" until it received the purported shareholder's demand to file suit. *See id.*; *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 185 (3rd Cir. 2001) ("uninjured plaintiffs" in a putative class action under Section 10(b) of the Exchange Act were "in search of a windfall" because they suffered no economic loss). Common sense dictates that a disgorgement award for an injury that never occurred provides a windfall rather than compensation for an economic loss. *See Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 892 (8th Cir. 2000).

Such an award is inherently punitive, placing the decision in conflict with Section 28(a)'s preclusion of punitive damages and limitation to "actual damages." This punitive character also contradicts this Court's clarification in *Liu v. SEC*, 140 S. Ct. 1936 (2020), that disgorgement must be remedial, not punitive. Courts, including the Second Circuit, have recognized this statutory bar. *See, e.g., Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1031 (9th Cir. 1999); *Stone v. Kirk*, 8 F.3d 1079, 1093 (6th Cir. 1993); *Pelletier v. Stuart-James Co.*, 863 F.2d 1550, 1557 (11th Cir. 1989); *Byrnes*, 550 F.2d at 1313. Nonetheless, by affirming a disgorgement award in favor of an issuing corporation that neither alleged nor suffered economic loss because of

the trading activity of a faultless shareholder, the Second Circuit essentially held that Section 16(b) may serve punitive rather than compensatory objectives. This Court has observed that punitive damages "are aimed not at compensation but principally at retribution and deterring harmful conduct." *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008). Thus, lacking a compensatory purpose, the underlying disgorgement award amounts to punitive damages in contravention of both the plain language of Section 28(a) and the role of disgorgement as an equitable remedy that "historically excludes punitive sanctions." *See Liu,* 140 S. Ct. at 1940.

For these reasons, an overriding need exists for a decision by this Court that establishes the meaning of "actual damages" as codified in Section 28(a) and determines its proper application to Section 16(b) claims. The Second Circuit's ratification of the district court's use of the disgorgement remedy, rather than actual damages as required by Section 28(a), demonstrates that concrete harm is absent here. Microbot has not suffered concrete harm merely because the district court invoked the disgorgement remedy set forth in Section 16(b). As this Court has repeatedly held, Congress cannot statutorily create Article III standing by enacting a remedy for an injury that does not exist, such as here, where Microbot's actual damages are zero after having suffered no economic loss because of Mona's trading in its stock. *See TransUnion*, 141 S. Ct. at 2205; *Spokeo*, 578 U.S. at 341. Even the Second Circuit has held in other contexts that plaintiffs lack Article III standing when alleged statutory violations have not caused them concrete harm. *See Harty v. West Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) ("a plaintiff has standing to bring a claim for monetary

damages following a statutory violation only when he can show a current or past harm beyond the statutory violation itself"); *Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58, 64 (2d Cir. 2021) ("in suits for damages plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm").

Having failed to allege or otherwise establish concrete harm in the form of actual damages, Microbot necessarily lacks Article III standing under the plain language of Section 28(a) and the precedents of this Court and other circuits. Because the Second Circuit therefore manifestly erred in affirming the district court's denial of Mona's motion to vacate the underlying judgment and dismiss Microbot's claims for lack of subject-matter jurisdiction, the Court should grant review to avoid future misguided lower court decisions and ensure uniformity in this crucial aspect of federal securities law.

B. The Second Circuit's Holding That An Issuing Corporation Has Article III Standing To Maintain A Section 16(b) Disgorgement Action In The Absence Of Pecuniary Harm Conflicts With Decisions Of This Court, Other Circuits, And Even The Second Circuit.

Like its disregard for the lack of "actual damages" under Section 28(a), the Second Circuit overlooked how the absence of pecuniary harm forecloses Article III standing. This oversight threatens separation of powers by extending jurisdiction beyond the "Cases" and "Controversies" limit of Article III. Based on this Court's analysis in *TransUnion*, *Spokeo*, and *Liu*, Article III standing to seek disgorgement under Section 16(b)

should only exist when the issuing corporation or its investors have suffered pecuniary harm. By definition, disgorgement is an equitable remedy intended for the sole benefit of "victims." *See Liu*, 140 S. Ct. at 1940. This remedy is based on the "foundational principle" that "'[i]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong.'" *Id.* at 1943 (quoting *Root v. Ry. Co.*, 105 U.S. 189, 207 (1882)). Significantly, however, "[a]t the same time courts recognized that the wrongdoer should not profit 'by his own wrong,' they also recognized the countervailing equitable principle that the wrongdoer should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'" *Id.* (quoting *Tilghman v. Proctor*, 125 U.S. 136, 145-46 (1888)). Consequently, this Court has compared "disgorgement to restitution that simply 'restor[es] the status quo,' thus situating the remedy squarely within the heartland of equity." *Id.* (internal quotation marks omitted).

Notably, in *SEC v. Govil*, 84 F.4th 89 (2d Cir. 2023), the Second Circuit relied on *Liu* to find that defrauded investors must suffer pecuniary harm before they are entitled to disgorgement under 15 U.S.C. § 78u(d)(5) or 15 U.S.C. § 78u(d)(7). *See Govil*, 84 F.4th at 94, 103. According to *Govil*, this Court's reasoning in *Liu* compels the conclusion that pecuniary harm is a prerequisite to disgorgement:

> If we were to understand "victim" as including defrauded investors who suffered no pecuniary harm—and thus to allow those investors to receive the proceeds of disgorgement—we would not be restoring the status quo for those investors. We would be conferring a windfall on those who received the benefit of the bargain.

Id. at 103. The Second Circuit elaborated that when *Liu* stressed that disgorgement as an equitable remedy meant "'return[ing] the funds to victims,'" it was "presuppos[ing] pecuniary harm" because "[f]unds cannot be returned if there was no deprivation in the first place." *Id.* (quoting *Liu*, 140 S. Ct. at 1948). While the Fifth and Eleventh Circuits agree that pecuniary harm is a prerequisite to disgorgement under *Liu*, the First Circuit does not. *Compare SEC v. Almagarby*, 92 F.4th 1306, 1320 (11th Cir. 2024) (citing *Liu*'s requirement that disgorgement be "awarded for victims" and observing that, "[w]hen the Commission is able to identify investors who have suffered pecuniary harm, disgorgement satisfies the requirement that disgorgement be 'for the benefit of investors'"), *and SEC v. Blackburn*, 15 F.4th 676, 682 (5th Cir. 2021) (affirming a disgorgement award in accordance with *Liu* that served to "return" no more than defendants' net profits to "victims" that were "harmed" by their fraud) *with SEC v. Navellier & Assocs., Inc.*, 108 F.4th 19, 41 (1st Cir. 2024) (asserting that "[n]either *Liu* nor our case law … require investors to suffer pecuniary harm as a precondition to a disgorgement award").

Although the decision below failed to address the legal effect of *Liu* and its progeny on Section 16(b) despite the Second Circuit's recent consideration of disgorgement in *Govil*, this Court's resolution of this conflict is essential to provide lower courts with needed guidance as they decide whether an issuing corporation or its investors have suffered the concrete harm required for Article III standing to maintain a Section 16(b) claim. The correct approach is *Govil*'s application of *Liu*, which would recognize that disgorgement is available as a remedy for Section 16(b) violations only when an issuing corporation

or its investors have suffered pecuniary harm, because it is consistent with the Article III standing requirements recently articulated by this Court in *TransUnion* and *Spokeo*.

Applying this approach, it is readily apparent that disgorgement is improper here, where there is no status quo to restore and Microbot is not a "victim" as discussed in *Liu* and defined in *Govil*. By nevertheless affirming the disgorgement award below, the Second Circuit conferred a windfall on Microbot because no pecuniary harm resulted from any act or omission by Mona, who has been and remains an innocent, noncontrolling shareholder that has no affiliation with Microbot and no inside information. Because the lack of pecuniary harm equates to a lack of concrete injury, it is self-evident that neither issuing corporations nor their investors have Article III standing to seek disgorgement under Section 16(b) unless the defendant's alleged conduct caused them pecuniary harm. With Microbot unable to allege or otherwise demonstrate pecuniary harm from Mona's trading in its stock, the Second Circuit manifestly erred in affirming the district court's denial of Mona's motion to vacate the underlying judgment and dismiss Microbot's claims for lack of subject-matter jurisdiction. For these reasons, it is essential for the Court to grant review to clarify the Article III standing principles applicable to this key aspect of federal securities law.

C. The Second Circuit's Holding That A Section 16(b) Claim Is Analogous To Common-Law Breach Of Fiduciary Duty For Purposes Of Article III Standing When The Issuing Corporation Has Neither Alleged Nor Suffered Damages Conflicts With Decisions Of This Court And Other Circuits.

The Second Circuit's attempt to satisfy the concrete harm requirement of Article III standing by analogizing Microbot's Section 16(b) claim to a common-law cause of action for breach of fiduciary duty deepens a circuit split that arises from a fundamental misapprehension of *TransUnion*. This Court recognized in *TransUnion* that, in general, "'history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.'" *See TransUnion*, 141 S. Ct. at 2204 (quoting *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008)). "And with respect to the concrete-harm requirement in particular," *TransUnion* resolved that "courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* (quoting *Spokeo*, 578 U.S. at 341.) This "inquiry" calls on courts to determine "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.* While the answer to this question "does not require an exact duplicate in American history and tradition" to find Article III standing, *TransUnion* made clear that it also does not offer "an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *See id.* The Second Circuit misapplied these principles by

invoking an unsuitable historical or common-law analogue, resulting in its erroneous finding of concrete harm and, therefore, Article III standing.

Although analogizing a Section 16(b) claim to common-law breach of fiduciary duty might be appropriate for certain plaintiffs, that analogy fails here because a "close relationship" is missing between Microbot's alleged harm and breach of fiduciary duty. *See TransUnion*, 141 S. Ct. at 2209. Specifically, no historical or common law analogue exists for imposing fiduciary-like duties on an innocent, noncontrolling shareholder, such as Mona, who caused no damage and has no affiliation with the issuing corporation or inside information. *See* Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. Rev. Online 269, 285-86 (2021) (citing *Donoghue* and observing that there is no historical or common law analogue for Section 16(b), where "no injury would exist without the statute" and "an investor's on-going financial interest in recovering short-swing profits pursuant to § 78p(b) was enough to satisfy injury-in-fact for standing" prior to *TransUnion*). Thus, as it misguidedly did in *Donoghue* and *Packer*, the Second Circuit below purported to recognize "intangible injuries" for the breach of fiduciary duties that Congress neither permitted nor contemplated in the Exchange Act and that plainly have no application here.

In addition, this Court has long recognized that even true insiders, such as corporate officers and directors, have no common-law fiduciary duty regarding stock trading except when they act on material, nonpublic information. *See SEC v. Chenery Corp.*, 332 U.S. 194, 198 (1947) ("courts do not impose upon officers and directors

of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation's stock"). This lack of a fiduciary duty was the majority rule when Congress enacted Section 16(b). *See* Kenneth L. Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act*, 38 Mich. L. Rev. 133, 139 (1939) ("[a] preponderant majority of the courts, including the courts of practically all the financial and industrial states, have held flatly that an officer or director of a corporation does not sustain a fiduciary relation to an individual stockholder with respect to his stock and that, consequently, the mere failure on the part of the officer or director to disclose inside information will not militate against him so long as he does not actively mislead the seller or perpetrate a fraud"). As a result, if true insiders have no fiduciary duty at common law, an innocent, noncontrolling shareholder that has no affiliation with the issuing corporation or inside information necessarily has no such duty under Section 16(b).

The Second Circuit misguidedly concluded otherwise, leading it to find Article III standing where none exists, because its failure to require the plaintiff to plead the essential elements of breach of fiduciary duty obscured the absence of damages and, accordingly, concrete harm. Even though *TransUnion* requires the plaintiff to identify the historical or common-law analogue for its alleged injury, it was the Second Circuit, not Microbot, which maintained that the Section 16(b) claim asserted below was akin to common-law breach of fiduciary duty. (App. 3a.) Given that Microbot did not even mention breach of fiduciary duty in its complaint, let alone plead the essential elements of the

cause of action, the Second Circuit apparently concluded that such pleading was unnecessary and found Microbot's mere allegation of a statutory violation sufficient to establish the concrete harm required to maintain its Section 16(b) claim. (App. 2a-3a.) Prior to its order below, the Second Circuit impliedly reached the same conclusion in *Packer* and *Donoghue*, where it held that a statutory violation alone was sufficient to demonstrate concrete harm under Section 16(b) without addressing the legal significance of the plaintiffs' failure to plead the essential elements of breach of fiduciary duty as the purported historical or common-law analogue.

Elsewhere, however, the Second Circuit stated that, under *TransUnion*, a plaintiff need not "adequately plead every element of a common-law analog to satisfy the concreteness requirement." *See Salazar v. Nat'l Basketball Ass'n*, 118 F.4th 533, 542 n.6 (2d Cir. 2024) (italics omitted). The Second Circuit instead purported to focus on the relationship between the plaintiff's alleged statutory harm and a harm traditionally recognized as providing a basis for relief without identifying meaningful guidelines for undertaking such an inquiry. *See id.* Other circuits, including the Third and Tenth Circuits, are in accord with this approach. *See Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 145 (3d Cir. 2024) ("[w]e believe that if the Court wanted us to compare elements, it would have simply said so"; "[s]o when asking whether a plaintiff's intangible injury is 'concrete,' we will examine the kind of harm at issue"); *Shields v. Pro. Bureau of Collections of Md., Inc.*, 55 F.4th 823, 829 (10th Cir. 2022) ("Shields did not have to plead and prove the tort's elements to prevail"; "[b]ut to proceed, she had to at least allege a similar harm"). However, all three circuits overlook that, while the concrete harm needed to establish

Article III standing for a statutory cause of action does not depend on an "exact duplicate" of a "traditionally recognized" claim, *TransUnion* requires that a plaintiff at least plead the elements that are "essential to liability" under the purported historical or common-law analogue to demonstrate that the requisite "close relationship" exists. *See TransUnion*, 141 S. Ct. at 2208-09.

Even the most cursory review of *TransUnion* reveals the Second, Third, and Tenth Circuit's error. In *TransUnion*, a class of 8,185 individuals sued a credit reporting agency under the Fair Credit Reporting Act for failing to use reasonable procedures to ensure the accuracy of their credit files, which led to mislabeling such individuals as national security threats. *Id.* at 2200. The mistake appeared in the credit files of all 8,185 individuals, but was only disseminated to potential creditors of 1,853 class members. *Id.* at 2200-02. The plaintiffs asserted that the alleged statutory violation had a "close relationship" to common-law defamation, which is characterized by reputational harm, and the Court agreed. *Id.* at 2208. Observing that there is "'no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury,'" the Court determined that whether a plaintiff suffered concrete harm necessarily turned on defamation's "essential" element of publication. *Id.* at 2209 (quoting *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018)). Because only the 1,853 class members whose inaccurate credit information had been disseminated suffered concrete harm, they had Article III standing to pursue their statutory claims while the others did not. *Id.* at 2208-09. Thus, *TransUnion* clarified that the existence of concrete harm for Article III standing depends on

whether the plaintiff asserts the essential elements of a common-law cause of action that is historically analogous to the alleged statutory claim.

Unlike the Second, Third, and Tenth Circuits, the Sixth and Eleventh Circuits adhere to *TransUnion*'s approach for ascertaining whether a plaintiff has sufficiently alleged concrete harm for Article III standing to maintain a statutory claim. Recently, in *Merck v. Walmart, Inc.*, 114 F.4th 762 (6th Cir. 2024), the Sixth Circuit considered whether a job applicant had Article III standing to sue under the Fair Credit Reporting Act after his prospective employer failed to give him the full consumer report on which it denied his application. The plaintiff attempted to establish concrete harm by asserting that his statutory claim was analogous to several traditional causes of action. However, guided by *TransUnion*'s "warn[ing]" that courts should "look out for 'essential' elements of liability that may appear in a traditional cause of action but that the modern claim lacks," the Sixth Circuit disagreed. *Id.* at 780 (quoting *TransUnion*, 141 S. Ct. at 2209). Among other things, the Sixth Circuit rejected the plaintiff's attempt to analogize his alleged injury to a traditional claim for denial of procedural due process because the essential element of state action was lacking and likewise dismissed his effort to equate his statutory claim to common-law unreasonable publicity of someone's private life and false light because publication is an essential element of both causes of action and the disclosure had only been made to the consumer that was the subject of the report. *Id.* at 780-85. Because the plaintiff therefore was unable to establish concrete harm by showing that his statutory claim satisfied the essential elements of a common-law analogue, the Sixth Circuit held that he lacked Article III standing. *Id.* at 786.

The Eleventh Circuit used similar reasoning and reached the same result in *Hunstein v. Preferred Collection & Management Services, Inc.*, 48 F.4th 1236 (11th Cir. 2022), in which the plaintiff alleged a violation of the Fair Debt Collection Practices Act after a debt collection agency disclosed information about his debt to a third party. Relying on *TransUnion*, the Eleventh Circuit pointed out that "when an element 'essential to liability' at common law is missing from an alleged harm, the common-law comparator is not closely related to that harm." *Id.* at 1244 (quoting *TransUnion*, 141 S. Ct. at 2209-10). That was the situation in *Hunstein*, where the plaintiff asserted that his statutory claim was analogous to the common-law tort of public disclosure, but did not allege publicity. *Id.* at 1240, 1246. Instead, while the "traditional tort requires publicity," the plaintiff only alleged "a disclosure to a private party." *Id.* at 1242. The failure to "allege an element essential to the harm set out as a common-law comparator" compelled the Eleventh Circuit to conclude that the plaintiff had no Article III standing. *See id.* at 1249-50.

Moreover, regardless of whether Section 16(b) could be construed as imposing a fiduciary duty on innocent, noncontrolling shareholders, the plaintiff below still cannot allege an actual injury to satisfy the concrete harm required for Article III standing. By itself, an alleged breach of fiduciary duty does not amount to concrete harm. Even when a breach of fiduciary duty has occurred, proof of "actual economic loss" remains a prerequisite to recovery. *See Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 473 (7th Cir. 1997). For this reason, it is well settled that "damages" is an essential element of a claim for breach of fiduciary duty. *See, e.g., First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d

214, 220 (Tex. 2017); *Gutierrez v. Girardi*, 125 Cal.Rptr.3d 210, 215 (Cal. App. 2011); *Barrett v. Freifeld*, 883 N.Y.S.2d 305, 308 (N.Y. App. Div. 2009); *Berner Cheese Corp. v. Krug*, 752 N.W.2d 800, 809 (Wis. 2008).

Consistent with this principle, this Court recently held that an alleged statutory violation consisting of a breach of fiduciary duty without an associated concrete harm, such as monetary loss, does not confer Article III standing. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618, 1620-22 (2020) (no Article III standing for ERISA violations resulting from alleged breach of fiduciary duty where plaintiffs suffered no concrete harm). Reaffirming *Spokeo*, the Court explained that it "has rejected the argument that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *Id*. at 1620 (quoting *Spokeo*, 578 U.S. at 341). Thus, the Second Circuit's notion that a plaintiff suffers concrete harm analogous to common-law breach of fiduciary duty simply because of an alleged statutory violation is untenable. (App. 3a.)

Nonetheless, even when a common-law analogue exists, the Second Circuit's premise that concrete harm results upon a statutory violation conflicts with the holdings of other circuits. For example, the Seventh Circuit recognized that "*Spokeo* and *TransUnion* put an end to federal courts hearing claims premised on *nonexistent* injuries—regardless of historical pedigree." *See Dinerstein v. Google, LLC*, 73 F.4th 502, 521 (7th Cir. 2023) (italics in original). Similarly, the Ninth Circuit concluded that "[a]n analogy to a traditionally recognized cause of action does not relieve a complainant of its burden to demonstrate an injury." *See Perry v. Newsom*, 18 F.4th

622, 632 (9th Cir. 2021). The decision below therefore stands at the center of circuit conflicts that need resolution regardless of how it is analyzed.

In sum, breach of fiduciary duty is not a historical or common-law analogue for the Section 16(b) claim asserted below because the essential element of damages is missing. Microbot brought its Section 16(b) claim without having "suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *See TransUnion*, 141 S. Ct. at 2206. "An uninjured plaintiff," like Microbot, "who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's 'compliance with regulatory law' (and, of course, to obtain some money via the statutory damages)." *Id.* The Court has already found that "[t]hose are not grounds for Article III standing." *Id.* Consequently, on this additional basis, the Second Circuit's decision below cannot survive scrutiny under this Court's Article III standing doctrine. *See id.* at 2206, 2214; *see also Forte Biosciences, Inc. v. Camac Fund, LP*, No. 3:23-CV-2399-N, slip op. at 6 (N.D. Tex. June 11, 2024) (Doc. 4) (dismissing Section 16(b) claim for lack of standing where plaintiff "does not plead any injury to itself from the alleged section 16(b) violation").

The Second Circuit failed to address why breach of fiduciary duty is unsuitable as a historical analogue here. This Court must resolve the deepening circuit split on applying *TransUnion* to determine Article III standing for statutory violations—with contradictory approaches now dividing the Second, Third, and Tenth Circuits from the Sixth, Seventh, Ninth, and Eleventh Circuits. This conflict reveals substantial confusion among courts

nationwide regarding the proper analytical framework for determining whether there is a historical or common-law analogue for a particular statutory claim. The failure to engage in a proper analysis inexorably leads to inconsistent outcomes and the finding of concrete harm for Article III standing when no injury actually exists. For these reasons, the Court should grant review to clarify the concept of "historical or common-law analogue" and promote the uniform application of Article III standing doctrine in cases arising under federal securities law, including Section 16(b).

CONCLUSION

For the foregoing reasons, the petition should be granted to restore uniformity to Article III doctrine, guide lower courts, and ensure federal courts remain within constitutional boundaries when adjudicating Section 16(b) claims.

Respectfully submitted,

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April 22, 2025

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JANUARY 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-559-cv

MICROBOT MEDICAL, INC.,

Plaintiff-Appellee,

v.

JOSEPH MONA,

Defendant-Appellant.[*]

Filed January 22, 2025

PRESENT: JOSÉ A. CABRANES, REENA RAGGI, MARIA ARAÚJO KAHN, *Circuit Judges.*

Appeal from the March 5, 2024 order of the United States District Court for the Southern District of New York. (George B. Daniels, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order is **AFFIRMED**.

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* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Appendix A

Plaintiff-Appellee Microbot Medical, Inc. ("Microbot") brought an action under Section 16(b) of the Securities Exchange Act of 1934 seeking to recover short-swing profits after Defendant-Appellant Joseph Mona ("Mona") sold Microbot securities within a six-month period while owning more than 10% of the company's stock. *See* 15 U.S.C. § 78p(b). The district court granted Microbot's motion for judgment on the pleadings, as recommended by the assigned magistrate judge. *See Microbot Med. Inc. v. Mona*, No. 19-CIV-3782-GBD-RWL, 2021 U.S. Dist. LEXIS 60960, 2021 WL 1192110, at *7 (S.D.N.Y. Mar. 30, 2021). Two years later, Mona filed a motion to vacate the judgment and to dismiss the case for lack of standing under Article III of the Constitution, which the district court denied. Mona now appeals that decision.[1]

We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal, to which we refer only to explain our decision to affirm.

We review *de novo* the district court's denial of a Rule 12(b)(1) motion to dismiss for lack of constitutional standing. *See Packer ex rel. 1-800-Flowers.Com, Inc. v. Raging Cap. Mgmt., LLC*, 105 F.4th 46, 51 (2d Cir. 2024). In doing so, "we borrow from the familiar Rule 12(b)(6) standard, construing the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein." *Donoghue v. Bulldog Invs. Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012).

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1. Because we affirm the district court's decision on the merits, we need not address Microbot's timeliness arguments.

Appendix A

This Court has categorically held that "short-swing trading in an issuer's stock by a 10% beneficial owner in violation of Section 16(b) of the Securities Exchange Act causes injury to the issuer sufficient for constitutional standing." *Id.* at 180. In *TransUnion LLC v. Ramirez*, 594 U.S. 413, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021), the Supreme Court elaborated that the "concrete injury" sufficient to confer Article III standing must be a "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 427. Post-*TransUnion*, a question arose as to whether *TransUnion* abrogated *Donoghue*.

That question has since been answered by this Court's decision in *Packer*. There, we held that *Donoghue* remains good law, reaffirming its holding that "[t]he concrete injury that confers standing [on plaintiffs' Section 16(b) claims is] 'the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock.'" *Packer*, 105 F.4th at 55 (quoting *Donoghue*, 696 F.3d at 180). In the instant case, the parties do not dispute that Microbot has satisfied the requirements for a Section 16(b) claim by showing that Mona was "a statutory insider" who "purchased and sold Microbot stock within a six-month period." *See Microbot*, 2021 U.S. Dist. LEXIS 60960, 2021 WL 1192110, at *3. Accordingly, we are bound by our well-reasoned precedents in *Packer* and *Donoghue* and affirm the district court's denial of Mona's motion to dismiss for lack of Article III standing.

* * *

We have considered Mona's remaining arguments and conclude that they are without merit. For the reasons set forth above, the judgment of the District Court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 5, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 Civ. 3782 (GBD) (RWL)

MICROBOT MEDICAL, INC.,

Plaintiff,

-against-

JOSEPH MONA,

Defendant.

Filed March 5, 2024

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, United States District Judge:

Plaintiff Microbot Medical, Inc. ("Microbot") brought this action to recover short-swing profits against Defendant Joseph Mona ("Mona") under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), alleging that Mona profited from the purchase and sale of Microbot securities within a six-month period while owning more than 10% of the company's stock. (Second Am. Compl., ECF No. 44, ¶¶ 1–3.) On March 30, 2021,

this Court granted Plaintiff's motion for judgment on the pleadings. (Order Adopting R. & R., ECF No. 106.) The next day, judgment was entered against Defendant in the amount of $484,614.30.[1] (Clerk's J., ECF No. 107.) On April 12, 2023, Defendant filed a motion to vacate the judgment and to dismiss the case based on lack of standing under Article III of the Constitution. (Mot. to Dismiss for Lack of Jurisdiction ("Defendant's Motion"), ECF No. 220.)

Before this Court is Magistrate Judge Robert W. Lehrburger's January 30, 2024 Report and Recommendation ("Report") recommending that Defendant's Motion be denied. (Report, ECF No. 251.) Defendant filed timely objections to the Report, and Plaintiff filed a timely response to the Objections. (Def.' s Objs. ("Objections"), ECF No. 258; Pl.'s Resp. ("Response"), ECF No. 263.) Having reviewed the Report *de novo*, this Court OVERRULES the Objections and ADOPTS the Report in its entirety.

I. LEGAL STANDARDS

A. Reports and Recommendations of a Magistrate Judge

A reviewing court "may accept, reject, or modify, in whole or in part, the findings or recommendations" made

1. Execution on the judgment was stayed pending the resolution of a counterclaim assented by Defendant. (*See* Order, ECF No. 152; R. & R., ECF No. 251, at 1.) This Court dismissed Defendant's counterclaim with prejudice on August 22, 2023. (Mem. Decision & Order, ECF No. 233.)

within a magistrate judge's report. 28 U.S.C. § 636(b)(1)(C). The court must review *de novo* the portions of a magistrate judge's report to which a party properly objects. *Id.* Portions of a magistrate judge's report to which no or "merely perfunctory" objections have been made are reviewed for clear error. *Edwards v. Fischer*, 414 F. Supp. 2d 342, 346–47 (S.D.N.Y. 2006). Clear error is present when "upon review of the entire record, [the court is] left with the definite and firm conviction that a mistake has been committed." *Brown v. Cunningham*, No. 14-CV-3515 (VEC) (MHD), 2015 U.S. Dist. LEXIS 73178, 2015 WL 3536615, at *4 (S.D.N.Y. June 4, 2015) (citations omitted).

B. Motion to Vacate for Lack of Subject Matter Jurisdiction

A district court may relieve a party from a final judgment where "the judgment is void." Fed. R. Civ. P. 60(b)(4). "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (citing Restatement (Second) of Judgments § 22 (1982)). One such infirmity is the absence of subject matter jurisdiction. *See United Nat'l. Ins. Co. v. Waterfront N.Y. Realty Corp.*, 907 F. Supp. 663, 668 (S.D.N.Y. 1995); *see also Lynonville Say. Bank & Tr. Co. v. Lussier*, 211 F. 3d 697, 700 (2d Cir. 2000) ("[F]ailure of subject matter jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*."). A judgment that is void under Rule 60(b)(4)

because the court lacks subject matter jurisdiction must be vacated. *United Nat'l Ins. Co.*, 907 F. Supp. at 668.

Under Article III of the Constitution, a federal court's subject matter jurisdiction is limited to resolving "Cases" or "Controversies." U.S. Const. art. III, §§ 1–2; *see Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) (citation omitted) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). To satisfy the "case or controversy" requirement of Article III, a plaintiff must have standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy."). "Colloquially, standing means that a plaintiff has a 'personal stake' in the dispute." (Report at 3 (quoting *Raines*, 521 U.S. at 819).) In legal terms, constitutional standing has three elements: (1) the plaintiff suffered an injury in fact; (2) there is "a causal connection between the injury and the conduct complained of;" and (3) the injury likely will be redressed by judicial relief, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The plaintiff bears the burden to prove each element. *See id.* at 562.

Defendant's Motion in the instant case argues that Plaintiff did not allege or otherwise demonstrate an "injury in fact" sufficient to support Article III standing. (*See* Mem. L. Supp. ("Def's Mem."), ECF No, 221, at 4.) Injury in fact is defined as "an invasion of a legally protected

interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted).

II. THE REPORT IS ADOPTED IN ITS ENTIRETY

A. The Report Accurately Characterized § 16(b) and Article III Standing Caselaw

i. Article III Standing in § 16(b) Cases

§ 16(b) of the Securities Exchange Act "requires directors, officers, and beneficial owners of more than ten percent of a company's stock to disgorge their profits 'realized from the purchase and sale, or sale and purchase, of such stock occurring within a 6-month period.'" (Report at 3 (quoting *Gollust v. Mendell*, 501 U.S. 115, 117, 111 S. Ct. 2173, 115 L. Ed. 2d 109 (1991)).) The statute "authorizes the issuer—or owner of the security, if the issuer fails to act diligently—to sue for relief and receive the disgorged profits." (Report at 4 (citing 15 U.S.C. § 78p(b); *Donoghue v. Bulldog Invs. Gen. Piship*, 696 F.3d 170, 174 (2d Cir. 2012)).) The statute's purpose is to prevent "the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer." 15 U.S.C. § 78p(b). To achieve this purpose, § 16(b) removes the profits from an entire "class of transactions in which the possibility of abuse was believed to be intolerably great." *Bulldog*, 696 F.3d at 174 (quoting *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S.

418, 422, 92 S. Ct. 596, 30 L. Ed. 2d 575 (1972)). Imposing "a form of strict liability," § 16(b) applies even to those who might have violated it inadvertently. *Id.* (quoting *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 223, 132 S. Ct. 1414, 182 L. Ed. 2d 446 (2012)).

As to Article III standing in § 16(b) suits, the Second Circuit held in *Donoghue v. Bulldog Investors General Partnership* that "short-swing trading in an issuer's stock by a 10% beneficial owner . . . causes injury to the issuer sufficient for constitutional standing." 696 F.3d at 180. In affirming that the *Bulldog* plaintiff satisfied the injury-in-fact requirement, the Second Circuit explained that an issuer "has an interest in maintaining a reputation of integrity, an image of probity, for its § 16(b) insiders and in insuring the continued public acceptance and marketability of its stock." *Id.* at 177–78 (citation and internal quotation marks omitted). To protect this interest, § 16(b) confers on issuers a legal right that "makes 10% beneficial owners 'constructive trustee[s] of the corporation' with a fiduciary duty not to engage in short-swing trading of the issuer's stock . . . It is the invasion of this legal right . . . that causes an issuer injury in fact." *Id.* at 179 (quoting *Gratz v. Claughton*, 187 F.2d 46, 48 (2d Cir. 1951)). In other words, the violation of § 16(b) constitutes a breach of statutorily-imposed fiduciary duty and thereby results in a constructive trust containing the profits reaped from the violation. The issuer has a legal right to the profits contained in the constructive trust.

ii. *TransUnion*

Defendant argues that the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), which addressed standing under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, overruled *Bulldog.* (Def 's Mem, at 7; Report at 5.) In *TransUnion*, the Supreme Court expanded on the Article III injury-in-fact requirement for suits brought to vindicate statutory rights. 594 U.S. at 426. The Supreme Court explained that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right." *Id.* (quoting *Spokeo*, 578 U.S. at 341). To satisfy the injury-in-fact requirement, a plaintiff must allege a concrete harm that resulted from the defendant's violation of a statute. *Id.* at 427. That concrete harm must be a "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* A "traditionally recognized" harm is one with "a close historical or common-law analogue," although "an exact duplicate in American history and tradition" is not required. *Id.* at 424.

Applying these principles to the claims in *TransUnion*, the Supreme Court found that plaintiffs whose credit reports had falsely identified them as potential threats to national security satisfied the injury-in-fact requirement only if the credit report had been disclosed to a third party, as required in the traditional tort of defamation. *Id.* at 432–34. In other words, these plaintiffs satisfied the injury-in-fact requirement because the reputational harm they suffered when the inaccurate reports were disclosed

to third parties had "a 'close relationship' to the harm associated with the tort of defamation." *Id.* at 432. As to those plaintiffs who claimed they had received information about their credits reports in two separate mailings instead of one, where the FCRA requires provision of, *inter alia*, a "complete credit file," the Supreme Court held that the plaintiffs had not alleged any harm, traditional or otherwise. *Id.* at 440. As a result, they did not have standing to bring these claims. *Id.*

iii. § 16(b) Cases After *TransUnion*

Several district courts have addressed Article III standing in § 16(b) cases after the Supreme Court's decision in *Trans Union*. In *Packer ex rel. 1-800-Flowers.com, Inc. v. Raging Capital Management, LLC*, 661 F. Supp. 3d 3 (E.D.N.Y. 2023), a shareholder sued a beneficial owner of more than ten percent of a company's stock for disgorgement of short-swing profits under § 16(b). (Report at 10.) The court determined that "*Bulldog* cannot be squared with *TransUnion*," *Packer*, 661 F. Supp. 3d at 17, and that a plaintiff would need to show "actual reputational harm . . . flowing from [a defendant's] breach of Section 16(b)" to establish Article III standing.[2] *Id.* at 14. In *Avalon Holdings Corp. v. Gentile*, Nos. 18-CV-7291, 18-CV-8896 (DLC), 2023 U.S. Dist. LEXIS 128471, 2023 WL 4744072 (S.D.N.Y. July 25, 2023), on the other hand, that court determined that *Bulldog* "is entirely compatible with *Trans Union.*" 2023 U.S. Dist. LEXIS 128471, 2023

2. *Packer* is currently on appeal to the Second Circuit. *See* No. 23-367 (2d Cir. March 15, 2023).

WL 4744072, at *6. The court in *Avalon* explained that "[j]ust as the Supreme Court did in *Trans Union*, the Second Circuit in *Bulldog* analyzed the harm suffered by a § 16(b) plaintiff and reasoned that it was akin to the common law injury of breach of trust arising from the 10% beneficial owner's fiduciary duty to the issuer." *Id.* Citing *Avalon*, a court in the District of Colorado reached the same conclusion.[3] *See Revive Investing LLC v. Armistice Cap. Master Fund, LTD*, No. 20-CV-2849 (CMA) (SKC), 2023 U.S. Dist. LEXIS 145778, 2023 WL 5333768. at *7 (D. Colo, Aug, 18, 2023). The Colorado court explained:

> [T]he law of trusts analogized to in *Bulldog* is deeply rooted in the common law. Courts in this country have long held that "[i]t is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestui clue trust* for all the gain which he has made." *Barney v. Saunders*, 57 U.S. 535, 543, 14 L. Ed. 1047 (1853).

Revive, 2023 U.S. Dist. LEXIS 145778, 2023 WL 5333768, at *7.

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3. Courts in two other cases in this District have also reached this conclusion, disagreeing with *Packer*. *See Safe & Green Holdings Corp. v. Shaw*, No. 23-CV-2244 (DLC), 2023 U.S. Dist. LEXIS 153415, 2023 WL 5509319 (S.D.N.Y. Aug. 25, 2023); *Augenbaum v. Anson Invs. Master Fund LP*, No. 22-CV-249 (AS), 2024 U.S. Dist. LEXIS 12791, 2024 WL 263208 (S.D.N.Y. Jan. 24, 2024). "*Every single court* to address the issue of § 16(b) standing after *Packer* has disagreed with [it]. . . ." (Pl.'s Resp. at 2.)

B. Plaintiff Has Article III Standing

Plaintiff "has standing in this case for reasons set forth in *Bulldog, Avalon*, and *Revive*." (Report at 12.) District courts in the Second Circuit "must follow *Bulldog* unless *TransUnion* is an intervening decision." *Avalon*, 2023 U.S. Dist. LEXIS 128471, 2023 WL 4744072, at *2. If the holdings of *Bulldog* and *TransUnion* are "consistent with one another," *TransUnion* does not qualify as an intervening decision, and *Bulldog* "remains vital." *See Sec. & Exch. Commin v. Rio Tinto plc*, 41 F.4th 47, 53 (2d Cir. 2022). Because *Bulldog* determined that § 16(b) plaintiffs suffer concrete harm analogous to "the common law injury of breach of trust," *Avalon*, 2023 U.S. Dist. LEXIS 128471, 2023 WL 4744072, at *6, *Bulldog* is compatible with *Trans Union's* requirement that a plaintiff has suffered a harm with "a close historical or common-law analogue."[4] *TransUnion*, 594 U.S. at 424.

Defendant takes issue with the analogy to breach of trust, arguing that "[i]n contrast to corporate insiders, like officers or directors, a ten-percent beneficial [owner] under Defendant's circumstance has never been considered a

4. Although the plaintiff in *Bulldog* was a shareholder and not the issuer of the stock, the court made clear that the defendant was challenging whether the harm *to the issuer* was sufficient for constitutional standing and was not questioning the shareholder plaintiffs standing to sue on behalf of the issuer. *Bulldog*, 696 F.3d at 176. Nonetheless, this Court notes that Plaintiff in this case is the issuer, whereas in *Packer*, the only case in this District on which Defendant relies, the plaintiff is a shareholder and is not, himself, the issuer. *Packer*, 661 F. Supp. 3d at 7–8.

fiduciary." (Def.'s Objs. at 1.) "Defendant is a retail trader with no affiliation to Microbot and no 'insider' status of any kind." (*Id.* at 8.) Furthermore, according to Defendant, "there is no historical analog to imposing fiduciary-like duties on an innocent non-controlling stockholder like Defendant." (*Id.* at 9.) However, in enacting § 16(b), Congress decided to "impose[] a form of strict liability," thereby making even traders with no affiliation to a company "statutory insiders" if they surpass ten percent beneficial ownership. *See Bulldog*, 696 F.3d at 174 (quoting *Credit Suisse*, 566 U.S. at 223). Although "the wrongdoing that prompted the enactment of § 16(b)" is "trading on inside information." the "legal right that Congress created to address that wrongdoing" is "a 10% beneficial owner's fiduciary duty to the issuer not to engage in *any* short-swing trading." *Bulldog*, 696 F.3d at 177.

Moreover, as Defendant notes in his Objections, the issue here is "not whether the statutory *cause of action* is analogous to a historically recognized offense," but rather whether Plaintiff "has alleged a *harm* that is analogous to a historically recognized harm. . . ." (Def.'s Objs. at 10.) § 16(b) creates a duty required of stockholders surpassing 10% beneficial ownership and creates a clear cause of action not at issue in this case. The only question is whether the harm to Plaintiff satisfies the Article III injury-in-fact requirement. As the Report makes clear, "it is not the breach of fiduciary duty alone that equates to injury in fact. . . . There are no doubt many instances where a defendant breaches a fiduciary duty *without reaping profits* that would otherwise be subject to disgorgement pursuant to principles of equity and constructive trust."

(Report at 13 (emphasis added) (citations omitted),) A party in breach of § 16(b), on the other hand, has necessarily reaped profits from short-swing trading of the issuer's stock. Depriving a § 16(b) plaintiff, in this case the issuer, of those profits causes a harm analogous to depriving the beneficiary of a constructive trust of "the profits gained from a fiduciary's breach of their duty." (*Id.*) "Far from 'transform[ing] something that is not remotely harmful into something that is,' *TransUnion*, 141 S. Ct. at 2205 (internal quotation marks omitted), § 16(b) recognizes an injury that has well-established historical roots grounded in the common law." (*Id.* at 14.) Because Plaintiff has been deprived of Defendant's profits reaped from his short-swing trading of Plaintiff's stock in violation of § 16(b), Plaintiff has suffered a concrete harm. As a result, Plaintiff has Article III standing in this case, and this Court has subject matter jurisdiction.

III. CONCLUSION

Defendant's objections are OVERRULED. Magistrate Judge Lehrburger's Report is ADOPTED in its entirety. Defendant's motion to vacate the judgment and dismiss the case for lack of standing is DENIED.[55] The Clerk of

5. Defendant also proposes an alternative to vacating the judgment, asking this Court instead to stay execution of the judgment "while the parties await the Second Circuit's forthcoming decision in *Packer*." (Def.'s Objs. at 10.) To the extent that Defendant is asking this Court to grant a stay under Federal Rule of Civil Procedure 62(b) and waive the rule's bond requirement, Defendant's request is denied. *See* Fed. R. Civ. P. 62(b). When Magistrate Judge Lehrburger previously considered a request from Defendant to

Court is directed to close the open motion at ECF No. 220, accordingly.

Dated: March 5, 2024
New York, New York

SO ORDERED.

/s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

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grant a stay, he concluded that there was no "basis to dispense with or lessen the bond required by Rule 62(b)." (Order, ECF No. 245, at 3.) Defendant has not provided any additional evidence in the Objections or elsewhere to support waiving the bond requirement, so this Court declines to do so. (*See* Def.'s Objs. at 2, 10-11.) Because Plaintiff does not object to a stay provided that Defendant posts a bond in compliance with Rule 62(b), this Court will consider an application to stay enforcement of the judgment if Defendant posts an appropriate bond. (*See* Pl.'s Resp. at 3-5.)

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 30, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-CV-3782 (GBD) (RWL)

MICROBOT MEDICAL, INC.,

Plaintiff,

-against-

JOSEPH MONA,

Defendant.

Filed January 30, 2024

REPORT AND RECOMMENDATION TO HON. GEORGE B. DANIELS: MOTION TO VACATE AND DISMISS

ROBERT W. LEHRBURGER, United States Magistrate Judge.

This is a "short-swing profits" case in which Plaintiff Microbot Medical, Inc. ("Microbot") sued Defendant Joseph Mona ("Mona") under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), alleging that Mona was required to disgorge profits from his purchase

and sale of securities during a period of less than six months when he became a beneficial owner of more than 10% of Microbot securities. On March 30, 2021, the Court granted Microbot's motion for judgment on the pleadings. (Dkt. 106.) Judgment was entered against Mona in the amount of $484,614.30 on March 31, 2021. (Dkt. 107.) Execution on the judgment was stayed, however, pending resolution of Mona's counterclaims. (*See* Dkt. 152 ¶ 4.) The Court dismissed those counterclaims with prejudice on August 22, 2023. (Dkt. 233.) That same day, the Clerk of Court entered judgment to that effect. (Dkt. 234.) On April 12, 2023, however, Mona filed a motion to vacate the monetary judgment and dismiss Microbot's claims based on lack of standing under Article III of the Constitution. (Dkt. 220.) For the reasons that follow, the motion should be denied.[1]

LEGAL STANDARDS

A district court may relieve a party from a final judgment where, among other reasons, "the judgment is void." Fed. R. Civ. P. 60(b)(4). "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010). One such infirmity is the absence of subject matter jurisdiction. *See Lynonville Sav. Bank & Trust Co. v. Lussier*, 211

1. On November 30, 2023, Mona moved to stay enforcement of the money judgment against him pending this Court's decision on the instant motion to vacate. (Dkt. 241.) By separate order, the Court denies Mona's motion to stay enforcement.

F. 3d 697, 700 (2d Cir. 2000) ("failure of subject matter jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*"); *United National Insurance Co. v. Waterfront New York Realty Corp.*, 907 F. Supp. 663, 668 (S.D.N.Y. 1995) ("A judgment rendered by a court that lacks subject matter jurisdiction is void" under Fed. R. Civ. P. 60(b)(4) and must be vacated).

Under Article III of the Constitution a federal court's subject matter jurisdiction is limited to resolving "Cases" or "Controversies." U.S. Const. art. III §§ 1-2; *see Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government that the constitutional limitation of federal-court jurisdiction to actual cases or controversies"). To satisfy the "case or controversy" requirement of Article III, a plaintiff must have standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy). Colloquially, standing means that a plaintiff has a "personal stake" in the dispute. *Raines*, 521 U.S. at 819. In legal terms, constitutional standing has three elements: (1) the plaintiff suffered an injury in fact, (2) the injury was likely caused by the defendant, and (3) the injury likely will be redressed by judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). It is the plaintiff's burden to prove each element. *Id.* at 562.

Here, the issue for the instant motion is the "injury in fact" requirement. Injury in fact is defined as "an invasion

of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 561 (internal citations and quotation marks omitted).

DISCUSSION

The Court begins with a brief description of the short-swing profit statute, § 16(b), followed by the relevant legal landscape of standing, and concludes by explaining why the motion to dismiss should be denied.

A. Section 16(b)

Section 16(b) requires directors, officers, and beneficial owners of more than ten percent of a company's stock to disgorge their profits "realized from the purchase and sale, or sale and purchase, of such stock occurring within a 6-month period." *Gollust v. Mendell*, 501 U.S. 115, 117, 111 S. Ct. 2173, 115 L. Ed. 2d 109 (1991); *see also* 15 U.S.C. § 78p(b); *Packer ex rel. 1-800-Flowers.com v. Raging Capital Management, LLC*, 981 F.3d 148, 152 (2d Cir. 2020). The purpose of the statute, as stated therein, is to prevent "the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer." 15 U.S.C. § 78p(b). The statute "was crafted as a blunt instrument to impose a form of strict liability" that "tak[es] the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great."[2] *Donoghue v. Bulldog*

2. As a strict-liability statute, § 16(b) is indeed a "blunt instrument." The statute imposes liability on persons, such as

Investors General Partnership, 696 F.3d 170, 174 (2d Cir. 2012) (internal citations, quotation marks, and brackets omitted). "In contrast to most of the federal securities laws," however, "§ 16(b) does not confer enforcement authority on the Securities and Exchange Commission." *Id.* (internal quotation marks omitted). Instead, the statute authorizes the issuer—or owner of the security, if the issuer fails to act diligently—to sue for relief and receive the disgorged profits. 15 U.S.C. § 78p(b); *Bulldog*, 696 F.3d at 174.

B. *Bulldog*

In *Bulldog*, an investor in stock of a company called Invesco sued Bulldog to recover short-swing profits under § 16(b) after Invesco failed to bring suit. 696 F.3d at 173. Bulldog moved to dismiss for lack of standing, arguing that the plaintiff did not allege any actual injury to the issuer, Invesco, from Bulldog's short-swing trades. *Id.* The district court denied the motion, and the Second Circuit affirmed.

In so affirming, the Court explained that "pursuant to § 16(b), when a stock purchaser chooses to acquire a 10% beneficial ownership stake in an issuer, he becomes a corporate insider and thereby accepts the limitation that attaches to his fiduciary status: not to engage in

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day traders for example, who, rather than trading on insider information, may have errantly surpassed ten percent ownership and then engaged in assorted buy and sell transactions within months, weeks, days, or even minutes. Nonetheless, Congress has determined that such persons are to be treated as insiders.

any short-swing trading in the issuer's stock." *Id.* at 177 (internal quotation marks and brackets omitted). "[A]fter all," the Court reasoned, "[a] corporate issuer . . . has an interest in maintaining a reputation of integrity, an image of probity, for its § 16(b) insiders and in insuring the continued public acceptance and marketability of its stock." *Id.* at 177-78 (internal quotation marks omitted). To protect that interest, § 16(b) confers on issuers, in addition to officers and directors, a legal right that:

> makes 10% beneficial owners "constructive trustees of the corporation," with a fiduciary duty not to engage in short-swing trading of the issuer's stock at the risk of having to remit to the issuer any profits realized from such trading. It is the invasion of this legal right, without regard to whether the trading was based on inside information, that causes an issuer injury in fact and that compels our recognition of plaintiff's standing to pursue a § 16(b) claim here.

Id. at 179 (quoting *Gratz v. Claughton*, 187 F.2d 46, 48 (2d Cir. 1951)) (internal citations and brackets omitted).

C. *TransUnion*

In 2021, the Supreme Court decided *TransUnion LLC v. Ramirez*, 594 U.S. 413, 141 S. Ct. 2190 (2021), which addressed standing under a different statute, the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. There, a class of plaintiffs sued TransUnion, alleging that

TransUnion had inaccurately identified them as matches to persons on a list believed to be threats to national security. 141 S. Ct. at 2201. TransUnion, plaintiffs claimed, violated the FCRA by failing to use reasonable procedures to ensure accuracy of their credit files and by not providing plaintiffs with their complete credit files or a summary-of-rights document as required by the statute. *Id.* at 2200-01. With respect to the last two claims, the gravamen boiled down to one claim: that TransUnion had sent two separate mailings rather than one complete mailing. *Id.* at 2213.

Justice Kavanaugh authored the majority opinion for a five-to-four split. In doing so, he set forth "fundamental standing principles" about what makes a harm sufficiently "concrete" for purposes of Article III. *Id.* at 2207-10. Invoking the Court's earlier *Spokeo* decision, Justice Kavanaugh opined that determining whether a harm is sufficiently concrete requires assessing "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.* at 2204 (citing *Spokeo*, 578 U. S. at 341). Expanding on that precept, Justice Kavanaugh stated that "[t]hat inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury" but "does not require an exact duplicate in American history and tradition." *TransUnion*, 141 S. Ct. at 2204.

Justice Kavanaugh then devoted considerable discussion to concreteness of claims made under federal statutes. He acknowledged that Congress may "elevate" to a statutory right those "harms that exist in the real

world," but that Congress "may not simply enact an injury into existence."[3] *Id.* at 2205 (internal quotation marks and omitted). As particularly relevant here, Justice Kavanaugh wrote that "this Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *Id.* (quoting *Spokeo*, 578 U.S. at 341). In other words, "[f]or standing purposes, . . . an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law." *TransUnion*, 141 S. Ct. at 2206. In short, a plaintiff who can establish that a defendant violated a federal statute but cannot demonstrate that the plaintiff suffered a concrete harm does not have constitutional standing.

Turning to the specific claims before the Court, Justice Kavanaugh determined that the plaintiffs who claimed TransUnion failed to follow reasonable procedures fell into two groups – those whose misleading credits reports were disseminated to third parties, and those whose reports were not disseminated. The Court held that the former group had standing because the injury they suffered bore a "close relationship" to a traditionally recognized harm, namely the tort of defamation. *Id.* at

3. Expressing a similar concern for undue expansion of Congressional power, Justice Kavanaugh opined, "if the law of Article III did not require plaintiffs to demonstrate a 'concrete harm,' Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law." *TransUnion*, 141 S. Ct. at 2206.

2208. The latter group, however, did not have standing because "there is no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." *Id.* at 2209 (internal quotation marks omitted).

With respect to the two other claims at issue – failure to provide a complete credit file and a statement of rights – the Court held that no plaintiffs had standing. Justice Kavanaugh noted that the two claims were intertwined and amounted to no more than a claim that plaintiffs had received the required information in two mailings rather than one and thus were "formatted" incorrectly. *Id.* at 2213. He then noted that plaintiffs did not demonstrate any harm "***at all*** from the formatting violations" – not even that any plaintiff, other than the named plaintiff, had even looked at the mailings or that, if they looked at what was sent, they would have tried to prevent dissemination of a misleading report. *Id.* (emphasis in original).

D. The Second Circuit's *Maddox* Decisions

The Second Circuit had occasion to consider the "before-and-after" impact of *TransUnion* in *Maddox v. Bank of New York Mellon Trust Co., N.A.*, 997 F.3d 436 (2d Cir. 2021) ("*Maddox I*"), *opinion withdrawn and superseded on rehearing*, 19 F.4th 58 (2d Cir. 2021) ("*Maddox II*"). In that case, plaintiffs sued a lender for delay in recording a satisfaction of mortgage in violation of two New York state laws governing satisfactions of mortgage. The New York law provides a private right of action to mortgagors to collect an escalating cash penalty if the satisfaction is filed more than thirty days after the mortgage is paid off, up to $1,500 for delay exceeding

ninety days. N.Y. R.P.L. § 275; *Maddox I*, 997 F.3d at 444-45.

In assessing standing, the Court did not focus on the statute's monetary penalties. Instead, consistent with earlier Supreme Court precedent, and what would be reiterated in *TransUnion*, the Court looked to historical analogs for the statutory injury and remedy. The Court noted that "a lender's delay in recording the satisfaction of a mortgage typically creates a cloud on title of real estate," and an action to clear clouded title was a remedy traditionally recognized under New York common law. *Id.* at 446. The Court further reasoned that such delays are similar to reputational based harms because they create "the false appearance that the borrower has not paid his debt," which harms the borrower's reputation by making him look less creditworthy. *Id.* at 446-47. Those findings supported standing.

But the Court's decision ultimately rested on analyses that were rejected in *TransUnion*. First, the Second Circuit focused on the distinction between statutory "procedural" rights, for which mere violation alone may not provide standing, and statutory "substantive" rights, for which a violation may provide standing. *Id.* at 446-52. Second, the Court held that even if only a procedural right, the delay plaintiffs alleged would be sufficient to confirm standing because the delay gave rise to "a material risk" of concrete harm. *Id.* at 448.

In the wake of *TransUnion*, the Second Circuit withdrew its decision in *Maddox I* and issued *Maddox II*. In that decision, the Second Circuit adhered to its earlier

findings that the delay in recording satisfaction can give rise to harms such as cloud on title and false appearance of debt posing reputational harm that "is well established as actionable at common law." 19 F.4th at 65. But the court found that the plaintiffs "did not allege such harms." *Id.* at 64. Applying *TransUnion*, the Court explained that the mere existence of the recorded mortgage without satisfaction was merely "nebulous risk of future harm" and akin to the undisseminated misleading credit reports that were insufficient to confer standing in *TransUnion*. *Id.* at 65. In closing, the Court noted that the plaintiffs still could pursue the statutory monetary penalties but that they would have to do so in state court. *Id.* at 66.

Encapsulating its rationale, the Court stated: "In sum, *TransUnion* established that in suits for damages plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm: 'No concrete harm; no standing.'"[4] *Id.* (quoting *TransUnion*, 141 S. Ct. at 2214).

E. Section 16(b) Cases After *TransUnion*

Since *TransUnion*, a handful of district courts have rendered decisions on the question of whether the

4. The Second Circuit also has applied *TransUnion* to find that "testers" without concrete plans to make use of services offered through defendants' websites did not have standing to sue for the websites' alleged non-compliance with Americans With Disabilities Act. *See Harty v. West Point Realty, Inc.*, 28 F.4th 435, 443-44 (2d Cir. 2022); *Laufer v. Ganesha Hosp. LLC*, No. 21-995, 2022 U.S. App. LEXIS 18437, 2022 WL 2444747, at *2 (2d Cir. July 5, 2022).

Supreme Court's decision effectively overrules *Bulldog*. Those decisions reflect a split of opinion, including between two Second Circuit district courts.

In *Packer ex rel. 1-800-Flowers.com, Inc. v. Raging Capital Management, LLC*, (E.D.N.Y. 2023), the court determined that *Bulldog* could not be reconciled with *TransUnion* and granted the defendants' motion to dismiss for lack of standing. The case began when a shareholder acting derivatively on behalf of the company 1-800-Flowers.com sued a beneficial owner of more than ten percent of the company's stock for disgorgement of short-swing profits under § 16(b). The court found that the plaintiff had not pointed to or articulated any actual reputational harm flowing from the defendant's breach of § 16(b). 661 F. Supp.3d at 14. The court emphasized that it was not holding that a plaintiff could never establish standing under § 16(b) but rather only that the plaintiff had not made the necessary showing in that specific case. *Id.* at *17. *Packer* currently is on appeal to the Second Circuit, where it has been fully briefed. *See* No. 23-367 (2d. Cir. March 15, 2023).

A few months after *Packer*, Judge Denise L. Cote in this District disagreed with *Packer* and held that *Bulldog* remained sound law.[5] *See Avalon Holdings Corp. v. Gentile*, No. 18-CV-7291, 2023 U.S. Dist. LEXIS 128471, 2023 WL 4744072, at *3 (S.D.N.Y. July 25, 2023). Judge

5. Coincidentally, Judge Cote authored the District Court opinion in *Bulldog*, which the Second Circuit affirmed. *See Donoghue v. Morgan Stanley High Yield Fund*, No. 10-CV-3131, 2010 U.S. Dist. LEXIS 53352, 2010 WL 2143664 (S.D.N.Y. May 27, 2010).

Cote explained that "[j]ust as the Supreme Court did in *TransUnion*, the Second Circuit in *Bulldog* analyzed the harm suffered by a § 16(b) plaintiff and reasoned that it was akin to the common law injury of breach of trust arising from the 10% beneficial owner's fiduciary duty to the issuer. *Bulldog*, therefore, is entirely compatible with *TransUnion*." 2023 U.S. Dist. LEXIS 128471, [WL] at *6. At the same time, Judge Cote noted that the *Avalon* plaintiff had not merely relied on "barebones allegations of a statutory violation" but also had alleged indicia of actual injury including dramatic fluctuations in stock prices.[6] *Id.*

Less than a month later, a court in the District of Colorado followed *Avalon* and the pre-*TransUnion* reasoning of *Bulldog* to find standing in a § 16(b) case. *Revive Investing LLC v. Armistice Capital Master Fund, LTD*, No. 20-CV-2849, 2023 U.S. Dist. LEXIS 145778, 2023 WL 5333768, at *7 (D. Col. Aug. 18, 2023). The court found persuasive the theory of injury set forth in *Bulldog* and agreed with *Avalon*, "that 'the harm suffered by a § 16(b) plaintiff . . . [is] akin to the common law injury of breach of trust arising from the 10% beneficial owner's fiduciary duty to the issuer.'" 2023 U.S. Dist. LEXIS 145778, [WL] at *7 (quoting *Avalon*, 2023 U.S. Dist. LEXIS 128471, 2023 WL 4744072, at *6). Elaborating on the injury incurred, the court explained:

> the law of trusts analogized to in *Bulldog* is deeply rooted in the common law. Courts in this

6. Shortly after issuing her decision in *Avalon*, Judge Cote relied on the reasoning of that decision to uphold standing in another § 16(b) case. *See Safe and Green Holdings Corp. v. Shaw*, No. 23-CV-2244, 2023 U.S. Dist. LEXIS 153415, 2023 WL 5509319, at *2 (S.D.N.Y. Aug. 25, 2023).

> country have long held that "[i]t is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestui que trust* for all the gain which he has made." *Barney v. Saunders*, 57 U.S. 535, 543, 14 L. Ed. 1047 (1853).

Revive, 2023 U.S. Dist. LEXIS 145778, 2023 WL 5333768, at *7; *see also* Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. Sch. L. Rev. 209, 344-45 (1987) ("The issuer's recovery of an insider's profit has common law antecedents. . . . The legislative history and the Second Circuit support this common law analogy"). The court also noted that "the analogue between Section 16(b) and a breach of fiduciary duty claim has been recognized long before *Bulldog*." *Revive*, 2023 U.S. Dist. LEXIS 145778, 2023 WL 5333768, at *7 (citing cases). The court thus concluded that the plaintiff had standing by virtue of adequately alleging short-swing trading by a ten percent beneficial owner in violation of § 16(b). 2023 U.S. Dist. LEXIS 145778, [WL] at *8.

F. Application

The Court is persuaded that Microbot has standing in this case for reasons set forth in *Bulldog, Avalon*, and *Revive*. This conclusion is consistent with *TransUnion*.

Section 16(b) allows an issuer, such as Microbot here, to sue an insider who engaged in short-swing trading while more than a ten percent beneficial owner, in this instance Mona, and recover the insider's short-swing

profits. The treatment of insiders as fiduciaries is rooted in common law history and tradition, as is the creation of a constructive trust for the fruits of the breach of the fiduciary's duty. *See Bulldog*, 696 F.3d at 179 (§ 16(b) confers on issuers a legal right that makes 10% beneficial owners "constructive trustee[s] of the corporation"); *Morrissey v. Curran*, 650 F.2d 1267, 1282 (2d Cir. 1981) ("At common law, an accounting surcharging a trustee for breach of his fiduciary duty was a readily available remedy"); *Gratz*, 187 F.2d at 51 ("the statute makes the fiduciary a constructive trustee for any profits he may make"); *Revive*, 2023 U.S. Dist. LEXIS 145778, 2023 WL 5333768, at *7 (observing that "the law of trusts analogized to in *Bulldog* is deeply rooted in the common law" and that it "is a well-settled principle of equity" that one "standing in a fiduciary character" is equitably accountable for any personal profits) (citing *Barney*, 57 U.S. at 543). Certainly Microbot has a personal stake in recovering the proceeds from a constructive trust created for its benefit. Put differently, Microbot incurs a concrete injury while deprived of the constructive trust's holdings. Microbot therefore has Article III standing.

A claim under § 16(b) is markedly different than claims under other statutes for which the courts, such as *TransUnion*, have found lack of standing. *See, e.g., Mumin v. Miller & Milone, P.C.*, No. 21-CV-1553, 2022 U.S. Dist. LEXIS 205376, 2022 WL 16857108, at *3 (S.D.N.Y. 2022) (Daniels, J.) (dismissing claims under Fair Debt Collections Practices Act ("FDCPA") and stating that "[d]istrict courts following *TransUnion* and *Maddox* have uniformly held that, absent specific evidence of reputational or monetary harm in FDCPA and FCRA cases, plaintiffs lack constitutional standing"). None of

those, to this Court's knowledge, entail any analog to a breach of fiduciary duty for which a constructive trust is created.

To be clear, it is not the breach of fiduciary duty alone that equates to injury in fact. (*Cf.* Pl. Mem. at 3 (asserting that "a breach of fiduciary duty is, in itself and standing alone, Article III injury in fact").[7]) There are no doubt many instances where a defendant breaches a fiduciary duty without reaping profits that would otherwise be subject to disgorgement pursuant to principles of equity and constructive trust. *See Yukos Capital S.A.R.L. v. Feldman*, 977 F.3d 216, 245 (2d Cir. 2020) (affirming award of nominal damages for breach of fiduciary duty). Nor is the relevant injury under § 16(b) necessarily based on "imminent or actual reputational disparagement" as Plaintiffs argue. (Pl. Mem. at 8-10.) Rather, concrete injury inheres in the issuer's deprivation of proceeds of a constructive trust containing the profits gained from a fiduciary's breach of their duty.

In support of his motion, Mona cites to *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009). (Def. Reply at 3.[8]) But that decision actually supports a finding of standing here. In *Kendall*, a plaintiff brought a class action against her retiree benefit plan administrator, alleging that the administrator

7. "Pl. Mem." refers to Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion To Dismiss For Lack Of Standing filed on May 16, 2023 at Dkt. 227.

8. Def Reply" refers to Defendant's Reply Memorandum Of Law In Support Of Defendant's Motion To Dismiss For Lack Of Standing filed on May 24, 2023 at Dkt. 228.

breached its duty to comply with its fiduciary obligation under the Employee Retirement Income Security Act ("ERISA"). The court distinguished the claims asserted from those where other "plaintiffs could point to an identifiable and quantifiable pool of assets to which they had colorable claims" and concluded that plaintiffs failed to allege an injury in fact required to confer standing because, while "[t]he statute does impose a general fiduciary duty to comply with ERISA," plaintiffs "must still allege some injury in the form of a deprivation of a right as a result of a breach of fiduciary duty conferred by ERISA." *Id.* at 120-21; *see also Thole v. United States Bank N.A.*, 590 U.S. 538, 140 S. Ct. 1615, 1619, 207 L. Ed. 2d 85 (2022) (holding plaintiff did not have standing to assert ERISA claim with respect to a defined benefit plan, because, unlike participants in a defined-contribution plan, "plan participants possess no equitable or property interest" in the defined-benefit plan).

That is precisely what is at stake here: deprivation of Microbot's right to disgorgement of insider profits. Far from "transform[ing] something that is not remotely harmful into something that is," *TransUnion*, 141 S. Ct. at 2205 (internal quotation marks omitted), § 16(b) recognizes an injury that has well-established historical roots grounded in the common law.

CONCLUSION

For the foregoing reasons, Defendant's motion to vacate the judgment and dismiss the case for lack of standing should be denied. To the extent not discussed above, the Court has considered Defendant's arguments and found them to be without merit.

Appendix C

DEADLINE FOR FILING
OBJECTIONS AND APPELLATE REVIEW

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days to file written objections to this Report and Recommendation. Any party shall have fourteen (14) days to file a written response to the other party's objections. Any such objections and responses shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable George B. Daniels, United States Courthouse, 500 Pearl Street, New York, New York 10007, and to the Chambers of the undersigned, at United States Courthouse, 500 Pearl Street, New York, New York 10007. Any request for an extension of time for filing objections must be addressed to Judge Daniels. **Failure to file timely objections will result in a waiver of the right to object and will preclude appellate review.**

SO ORDERED.

/s/ Robert W. Lehrburger
ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: January 30, 2024
New York, New York

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 31, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 CIVIL 3782 (GBD)(RWL)

MICROBOT MEDICAL, INC.,

Plaintiff,

-against-

JOSEPH MONA,

Defendant.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated March 30, 2021, Magistrate Judge Lehrburger's Report is ADOPTED. Microbot's motion for judgment on the pleadings and motion to dismiss Defendant Mona's counterclaim, (ECF No. 81), is GRANTED. Judgment is entered in favor of Microbot in the amount of $484,614.30. Defendant Mona's counterclaim against Microbot is dismissed with leave to attempt to replead his proposed Section 10(b) and Rule 110b-5 counterclaim solely with regard to the following statements: (1) Roe's statement that Microbot's "shares

were going to get to $10" and that he "purchased 10,000 shares in the company"; and (2) Altavilla's statements that Gadot was "in Minneapolis on business, meeting two Fortune 500 companies," and that he expected Microbot "to sign an SCS partnership any day."

Dated: New York, New York
March 31, 2021

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango
Deputy Clerk

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED DECEMBER 18, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-CV-3782 (GBD) (RWL)

MICROBOT MEDICAL, INC,

Plaintiff, Counter-Defendant,

-against-

JOSEPH MONA,

Defendant, Counter-Claimant.

Filed December 18, 2020

REPORT AND RECOMMENDATION TO HON. GEORGE B. DANIELS: MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS

ROBERT W. LEHRBURGER, United States Magistrate Judge.

Plaintiff Microbot Medical, Inc. ("Microbot"), seeks to recover short-swing profits from Defendant Joseph Mona ("Mona") under § 16(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78p(b). Section 16(b) is a

strict liability statute that prohibits a beneficial owner of more than 10% of a company's stock from buying or selling the company's stock within six months after acquiring beneficial ownership, and allows the company to recover any profits made by the beneficial owner during that period.

Microbot, an issuer of equity securities registered under § 12 of the Act, alleges that between November 2018 and January 2019, Mona was a beneficial owner of more than 10% of Microbot stock and engaged in prohibited transactions in violation of § 16(b). Mona counterclaims that Microbot violated § 10(b) of the Act, 15 U.S.C. § 78j(b), and Rule 10b-5, promulgated thereunder and codified at 17 C.F.R. § 240.10b-5, by making material misstatements (1) in filings with the U.S. Securities and Exchange Commission ("SEC"), (2) during conference calls with investors, and (3) through investor-relations consultants who solicited investments by phone.

Before the Court are Microbot's motion for judgment on the pleadings with respect to its § 16(b) claim pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, as well as Microbot's motion to dismiss Mona's § 10(b) counterclaim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, both of Microbot's motions should be GRANTED.

Appendix E

Factual Background: Microbot's § 16(b) Claim[1]

Microbot is a Delaware corporation in the business of creating micro-robotic technology devices for use in various fields of medicine. (Compl. ¶ 6.) Mona resides in South Carolina. (Compl. ¶ 8.)

On October 18, 2019, Mona filed a Form 3 "Initial Statement of Beneficial Ownership of Securities" with the SEC, indicating that as of November 16, 2018, he was the beneficial owner of 300,320 shares of "Microbot Medical Common Stock," which amounted to a 10.09% stake in the company's total outstanding common stock. (Compl. ¶¶ 13, 15; Tauber Decl., Ex. A, 10/18/2019 Form 3.) That same day, Mona made a Form 5 "Annual Statement of Changes in Beneficial Ownership" filing with the SEC reporting certain trades that he had made while he was a beneficial owner of Microbot stock. (Compl. ¶¶ 14-15; Tauber Decl., Ex. A, 10/18/2019 Form 5.) Soon afterward, on October 28, 2019, Mona made another Form 5 filing reporting other such trades. (Compl. ¶¶ 14-15; Tauber Decl., Ex. A, 10/28/2019 Form 5.)

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1. The Court draws the factual background from Microbot's Second Amended Complaint (Dkt. 44) ("Compl."), Mona's Answer and Counterclaim (Dkt. 59) ("Answer" or "Counterclaim"), and materials incorporated by reference in the pleadings – for instance, Mona's SEC filings attached as exhibits to Microbot's declaration filed in support of its motions (Affirmation of Miriam Tauber, Dkt. 82) ("Tauber Decl."). As required for both a motion for judgment on the pleadings and a motion to dismiss, the Court accepts as true all non-conclusory allegations of the non-moving party's pleading and draws all reasonable inferences in favor of the non-moving party.

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In his Answer, Mona asserts that from on or about November 19, 2018, to on or about January 14, 2019, he owned more than 10% of the outstanding common stock of Microbot and refers the Court to the SEC Forms 5 filed by him on October 18 and 28, 2019, for a complete and accurate recitation of their contents. (Answer ¶ 3.) The contents reveal the following:

	Date	**Transaction**	**Shares**	**Price**
(1)	Nov. 19, 2018	Purchase	2,400	$2.99
(2)	Nov. 21, 2018	Purchase	24,873	$2.21
(3)	Nov. 21, 2018	Sale	6,309	$2.96
(4)	Nov. 26, 2018	Purchase	37,986	$1.95
(5)	Jan. 8, 2019	Sale	2,269	$2.70
(6)	Jan. 9, 2019	Purchase	14,280	$2.19
(7)	Jan. 9, 2019	Sale	1,280	$2.27
(8)	Jan. 14, 2019	Purchase	1,773	$6.43
(9)	Jan. 14, 2019	Sale	281,773	$8.16

(Tauber Decl., Ex. A, 10/18/2019 Form 5 and 10/28/2019 Form 5.)

Based on the foregoing facts, Microbot claims Mona "had a direct or indirect 'pecuniary interest' in all of the shares of Microbot common stock purchased and sold in the transactions identified" and "realized short swing profits . . . as a result of those transactions, which [Mona] must disgorge to Microbot in proportion to [his] respective pecuniary interest[] therein." (Compl. ¶¶ 21-22.)

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Factual Background: Mona's § 10(b) Counterclaim

Mona began actively trading in Microbot stock on or about May 31, 2017, the day Microbot announced that the Canadian Intellectual Property Office had granted Microbot a patent for its Self-Cleaning Shunt ("SCS") for the treatment of hydrocephalus.[2] (Counterclaim ¶¶ 33, 45.) Two weeks earlier, on May 15, 2017, Microbot had filed a Form 10-Q with the SEC stating that management believed it had sufficient capital to fund operations for the twelve months following March 31, 2017. (Counterclaim ¶ 45.)

Then, on June 5, 2017, Microbot announced that it would be raising $10 million through the issuance and sale of 3,750,000 new shares, which included entering into a share purchase agreement (the "SPA") with Sabby Healthcare Master Fund Ltd. and Sabby Volatility Warrant Master Fund Ltd. (collectively, "Sabby"). (Counterclaim ¶ 47.) A provision in the SPA characterized Alpha Capital Anstalt ("Alpha") as "affiliated" with Microbot, which, if true, would have limited Alpha's ability to liquidate its Microbot shares pursuant to SEC rules. (Counterclaim ¶ 48.) Alpha, however, was not an affiliate of Microbot; and, around the time the SPA was executed, Alpha converted its preferred

2. "Hydrocephalus is an abnormal buildup of fluid in the ventricles (cavities) deep within the brain. This excess fluid causes the ventricles to widen, putting pressure on the brain's tissues." *Hydrocephalus Fact Sheet*, Nat'l Inst. of Neurological Disorders & Stroke, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Hydrocephalus-Fact-Sheet (last updated May 13, 2020).

stock into common stock and began selling shares in large quantities, which caused the price of Microbot stock to decline by 67%.[3] (Counterclaim ¶¶ 50, 52.)

On August 14, 2017, Microbot filed a Form 10-Q with the SEC stating that management believed it had sufficient capital to fund operations for the twelve months following the date of the financial statements therein. (Counterclaim ¶ 53.) Also on August 14, 2017, Microbot convened an investor conference call during which Harel Gadot, Microbot's CEO, stated that (1) Microbot had sufficient capital for the next twenty-four to thirty months and (2) Microbot was well placed in the market compared to its competitors because it had a "five-year head start" – even though one month earlier, Alcyone Lifesciences Inc. ("Alcyone") had submitted to the U.S. Food and Drug Administration (the "FDA") a request for approval of a directly competing, alternative device that also treated hydrocephalus, which the FDA approved on November 15, 2017. (Counterclaim ¶¶ 54-55, 57-59.)

In the meantime, certain investor-relations ("IR") consultants made statements directly to Mona about Microbot's financial health and business dealings. (Counterclaim ¶ 65.) Specifically, on or around August 7, 2017, Jeremy Roe called Mona and characterized Microbot stock as "lightning in a bottle," asserted that "the shares were going to get to $10" from around $1, and urged Mona

3. Sabby sued Microbot on the basis of the "affiliated" misrepresentation. On February 28, 2019, the New York State Supreme Court found that Microbot had breached multiple representations and warranties in the SPA. (Counterclaim ¶ 52.)

to buy more shares as Roe himself had "just purchased an additional 10,000 shares in the company." (Counterclaim ¶ 66.) On or around October 2, 2017, Tony Altavilla called Mona and told him that Gadot was "out in Minneapolis on business, meeting two Fortune 500 companies," and that Altavilla expected Microbot "to sign an SCS partnership any day." (Counterclaim ¶ 67.) During an investor town hall conference call held on February 1, 2018, Gadot stated that Microbot shares were "extremely cheap." (Counterclaim ¶ 62.)

Mona's trading in Microbot was considerable. For instance, in the period between August 2017 and May 2018, Mona accumulated some 1.69 million shares of Microbot, representing a 331% increase in his holdings of Microbot's stock. Mona claims he accumulated the shares in reliance on Gadot's statements and Microbot's SEC Form 10-Q filings concerning the financial health of the company. (Counterclaim ¶ 68.)

On September 8, 2018, Microbot announced a "reverse split" share structure under which, for every fifteen shares an investor owned, they would thereafter own only one share. (Counterclaim ¶ 70.) Shortly before the reverse split, Microbot's stock price had dropped by about 39% since August 2017; immediately after the split, however, the price rose about 1,000%, which reflected only the decreased number of shares and did not compensate shareholders for the reduction of their shares. (Counterclaim ¶¶ 70-71.)

On November 14, 2018, Microbot filed a Form 10-Q with the SEC stating that management believed it had

sufficient capital to fund operations for the next twelve months. (Counterclaim ¶ 72.) On December 31, 2018, Microbot filed an amended preliminary prospectus on Form S-1 with the SEC announcing that it would be offering an additional 6,024,096 shares once its registration statement was effective. (Counterclaim ¶ 74.) Upon learning of this news, Mona decided to dispose of the majority of his holdings. (Counterclaim ¶ 75.)

On January 15, 2019, Microbot offered 330,000 new shares, which were purchased by an institutional investor the following day; and on January 23, 2019, Microbot announced a direct offering of another 250,000 shares to institutional investors. (Counterclaim ¶ 77.) By the time Mona fully exited his Microbot position on February 19, 2019, he had incurred a net loss of $150,954. (Counterclaim ¶ 78.)

Procedural Background

This action was filed on April 28, 2019, and assigned to the Honorable George B. Daniels, U.S.D.J. (Dkt. 1.) The initial Complaint named only Alliance Investment Management Ltd. ("Alliance") as the defendant, seeking to recover short-swing profits under § 16(b) of the Act. (Dkt. 1.) Before Alliance could respond to Microbot's Complaint, Microbot filed an Amended Complaint on June 5, 2019, in which Microbot reasserted its § 16(b) claim but added a claim for injunctive relief under § 13(d) of the Act.[4] (Dkt. 13.)

4. Section 13(d) requires a person or group of persons acquiring beneficial ownership of more than 5% of a voting class

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On October 28, 2019, Alliance filed a motion for summary judgment, arguing that it was merely a broker dealer that had mistakenly made SEC filings taking credit for the beneficial ownership and transactions of one of its clients, Joseph Mona. (Dkt. 38.) Microbot and Alliance attended a telephonic discovery conference before the undersigned on November 7, 2019, and, in an Order issued that same day, the Court granted Microbot's request to file a second amended complaint to add Mona as a defendant. (Dkt. 41.)

Microbot filed its operative Second Amended Complaint on November 18, 2019, dropping its § 13(d) claim but naming both Alliance and Mona as defendants liable "singly, jointly, or in the alternative"; and maintaining that it would "need to discover the respective pecuniary interests of each of the Defendants, if any, and proceed against that or those Defendants to the extent thereof." (Compl. ¶¶ 16, 22.)

On December 3, 2019, Alliance renewed its motion for summary judgment. (Dkt. 45). In the next two months, Microbot and Alliance filed cross-motions for sanctions under Rule 11 of the Federal Rules of Civil Procedure. (Dkts. 54, 68.)

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of a company's equity securities registered under § 12 of the Act to file a Schedule 13D with the SEC reporting the acquisition and other information (such as the filer's identity, funding, and purposes) within ten days after the purchase. *See Schedules 13D and 13G*, SEC, https://www.investor.gov/introduction-investing/investing-basics/glossary/schedules-13d-and-13g (last visited Dec. 18, 2020).

Mona filed his Answer and Counterclaim on February 4, 2020, alleging violations of § 10(b) of the Act and Rule 10b-5. (Dkt. 59.) On March 6, 2020, Microbot filed a motion for judgment on the pleadings with respect to its § 16(b) claim against Mona, as well as a motion to dismiss Mona's § 10(b) Counterclaim. (Dkt. 80.)

Days earlier, on March 2, 2020, this case was referred to the undersigned for Report and Recommendation on all dispositive motions. (Dkt. 74.) I issued a Report and Recommendation on August 18, 2020, recommending that Alliance's motion for summary judgment be granted, Microbot's claims against Alliance be dismissed with prejudice, and both parties' cross-motions for sanctions be denied. (Dkt. 97.) On September 17, 2020, Judge Daniels adopted that Report and Recommendation in full. (Dkt. 98.) Microbot's remaining motions against Mona are the subject of the instant Report and Recommendation.

In the discussion that follows, the Court will attend first to Microbot's motion for judgment on the pleadings and then to Microbot's motion to dismiss Mona's Counterclaim.

Legal Standards

"Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law." *Burns International Security Services, Inc. v. International Union, United Plant Guard Workers*, 47 F.3d 14, 16 (2d Cir. 1995); *see also* Fed. R. Civ. P. 12(c). The standard for addressing a motion

for judgment on the pleadings pursuant to Rule 12(c) is the same as the standard used in evaluating a motion to dismiss under Rule 12(b)(6). *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011); *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010).

To survive a Rule 12(b)(6) motion, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is facially plausible when the factual content pleaded allows a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In considering a motion to dismiss for failure to state a cause of action, a district court must "accept[ ] all factual claims in the complaint as true, and draw[ ] all reasonable inferences in the [non-moving party's] favor." *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 403 (2d Cir. 2014) (internal quotation marks and citation omitted). This tenet, however, is "inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Rather, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . i.e., enough to make the claim plausible." *Arista Records LLC v. Doe 3*, 604 F.3d 110,

120 (2d Cir. 2010) (internal quotation marks and citations omitted). A complaint is properly dismissed where, as a matter of law, "the allegations in [the] complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

When deciding a motion to dismiss pursuant to Rule 12(b)(6), a court generally is confined to the facts alleged in the complaint. *See Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). A court may, however, consider additional materials, including documents attached to the complaint, documents incorporated into the complaint by reference, matters of which judicial notice may be taken, public records, and documents that the plaintiff either possessed or knew about, and relied upon, in bringing the suit. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013). In that regard, if "a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true." *Poindexter v. EMI Record Group Inc.*, No. 11-CV-559, 2012 U.S. Dist. LEXIS 42174, 2012 WL 1027639, at *2 (S.D.N.Y. March 27, 2012) (citing *Barnum v. Millbrook Care Limited Partnership*, 850 F. Supp. 1227, 1232-33 (S.D.N.Y. 1994)).

Microbot's Motion for Judgment on the Pleadings

In its motion for judgment on the pleadings, Microbot argues that § 16(b) imposes strict liability on Mona based on his acknowledged beneficial ownership of more than 10% of Microbot stock and trading within less than six

months. (MBOT Mem. at 1.[5]) In opposition, Mona argues that his trading was involuntarily induced by Microbot's "fraudulent coercion," and therefore the transactions at issue are "unorthodox" and beyond the reach of § 16(b). (MJP Opp. at 10.[6]) Additionally, Mona asserts equitable and statutory affirmative defenses – unclean hands and "windfall" under § 28(a) of the Act. (Answer ¶¶ 24-30.) For the following reasons, Microbot's motion for judgment on the pleadings should be granted.

A. Section 16(b) of the Act

Pursuant to § 16(b) of the Act, an insider's short-swing profits are subject to disgorgement. *See* 15 U.S.C. § 78p(b). Statutory insiders include directors, officers, and beneficial owners of more than 10% of any class of a company's registered equity securities. 15 U.S.C. § 78p(a)(1). Rule 16a-1(a)(1) defines "beneficial owner" as any person who is deemed a beneficial owner under § 13(d) of the Act and also owns more than 10% of any class of an issuer's equity securities registered under § 12 of the Act. 17 C.F.R § 240.16a-1(a)(1). Rule 13d-3(a), which governs § 13(d) of the Act, in turn defines a "beneficial owner" of a security as any person who has "[v]oting power which includes the power to vote, or to direct the voting of,

5. "MBOT Mem." means Microbot's Brief in Support of Plaintiff's Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings; Fed. R. Civ. P. 12(b)(6) Motion to Dismiss Defendant Mona's Counterclaim. (Dkt. 81.)

6. "MJP Opp." means Mona's Opposition to Plaintiff's Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings. (Dkt. 88.)

such security; and/or [i]nvestment power which includes the power to dispose, or to direct the disposition of, such security." 17 C.F.R. § 240.13d-3(a)(1)-(2).

The Act imposes strict liability for improper trading by an insider. Section 16(b) states in relevant part:

> For the purpose of preventing the unfair use of information which may have been obtained by [an insider] by reason of his relationship to the issuer, any profit realized by [the insider] from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of [the insider].

15 U.S.C. § 78p(b).

"A vital component of the Exchange Act, § 16(b) was designed to prevent an issuer's directors, officers, and principal stockholders from engaging in speculative transactions on the basis of information not available to others." *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170, 173-74 (2d Cir. 2012) (internal quotation marks omitted). It was "crafted as a blunt instrument to impose[] a form of strict liability," requiring "no showing of actual misuse of inside information or of unlawful intent." *Id.* at 174 (internal quotation marks and citations omitted). In other words, it "operates mechanically, and makes no moral distinctions, penalizing

technical violators of pure heart, and bypassing corrupt insiders who skirt the letter of the prohibition." *Magma Power Co. v. Dow Chemical Co.*, 136 F.3d 316, 320-21 (2d Cir. 1998).

To state a plausible claim under § 16(b), a plaintiff must plead facts sufficient to show "'that there was (1) a purchase and (2) a sale of securities (3) by an [insider] (4) within a six-month period.'" *Chechele v. Sperling*, 758 F.3d 463, 467 (2d Cir. 2014) (quoting *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998)).

It is undisputed that Mona sold Microbot stock within six months after becoming a beneficial owner of more than 10% of Microbot common stock (i.e., a Microbot insider). (Compl. ¶¶ 13-15; Answer ¶¶ 3, 5; Tauber Decl., Ex. A, 10/18/2019 Form 5 and 10/28/2019 Form 5.) Nonetheless, Mona argues that "[he] had amassed his underlying position in Microbot based on an array of . . . false and misleading statements made by Microbot's officers, directors, agents, and in SEC filings over the previous two years"; and then "exit[ed] his position in order to save himself" when "he came to understand that Microbot's threatened massive offering (apparently finalized two weeks earlier and awaiting SEC approval) stood to triple the number of outstanding Microbot shares, and thereby dilute him by two thirds." (MJP Opp. at 7-8.) Mona claims that "he had no choice" but to exit — the alternative was "to do nothing and watch Microbot effectively take his money after it fraudulently induced him to amass a large position in the stock." (MJP Opp. at 8.) "[A]t issue here," Mona alleges, "is . . . *Microbot's* fraudulent coercion and

the massive dilution which rendered Mona's purchases involuntary and therefore unorthodox" and beyond the reach of § 16(b); consequently, judgment on the pleadings is premature "without further factual investigation at least as to Microbot's fraud." (MJP Opp. at 9-10.)

Microbot, on the other hand, argues that under the well-established precedent set forth by the Supreme Court, the Second Circuit, and this District, the unorthodox transaction exception does not apply to Mona's trades as they were "ordinary cash-for-stock transaction[s]" on the open market. (MBOT Reply at 3, 5.[7]) Microbot is correct.

B. Mona's Trades Were Prohibited and Are Not Saved by the Unorthodox Exception

Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 93 S. Ct. 1736, 36 L. Ed. 2d 503 (1973), is the foundational case that sets forth the unorthodox transaction exception, which rescues certain "unorthodox" transactions that otherwise would fall within the ambit of the plain text of § 16(b). In *Kern*, Occidental Petroleum Corp. ("Occidental") acquired more than 10% of the outstanding stock of a target corporation by tender offer, but its hostile takeover efforts were blocked by a defensive merger between the target corporation and an acquiring corporation. Pursuant to the terms of the merger agreement between the target corporation and

7. "MBOT Reply" means Microbot's Reply Brief in Support of Plaintiff's Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings; Fed. R. Civ. P. 12(b)(6) Motion to Dismiss Defendant Mona's Counterclaim. (Dkt. 92.)

the acquiring corporation, Occidental became irrevocably bound to exchange its shares of the target corporation for shares of the acquiring corporation's preferred stock. In light of "the involuntary nature of Occidental's exchange, . . . coupled with the absence of the possibility of speculative abuse of inside information," the Supreme Court held that Occidental's transactions did not constitute "sales" within meaning of § 16(b). 411 U.S. at 595-600.

The Supreme Court explained,

> Although traditional cash-for-stock transactions that result in a purchase and sale or a sale and purchase within the six-month, statutory period are clearly within the purview of § 16(b), the courts have wrestled with the question of inclusion or exclusion of certain "unorthodox" transactions. The statutory definitions of "purchase" and "sale" are broad and, at least arguably, reach many transactions not ordinarily deemed a sale or purchase. In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent – the realization of short-swing profits based upon access to inside information – thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits.

Id. at 593-595. In other words, the threshold question is whether the transactions at issue are "traditional

cash-for-stock transactions that result in a purchase and sale or a sale and purchase within the six-month, statutory period." *Id.* at 593. If so, then the transactions "are clearly within the purview of § 16(b)." *Id.* If not, then the question is whether the transactions are "unorthodox" or "borderline" because they are "not ordinarily deemed a sale or purchase," the statutory definitions of which are "broad." *Id.* at 593-94. "Sale" means "any contract to sell or otherwise dispose of"; "purchase" means "any contract to buy, purchase, or otherwise acquire." 15 U.S.C. § 78c(a)(13), (14). Examples of unorthodox transactions provided by the Supreme Court include "stock conversions, exchanges pursuant to mergers and other corporate reorganizations, stock reclassifications, and dealings in options, rights, and warrants." 411 U.S. at 593 n.24.

As Microbot aptly argues, "the most fundamental requirement of the 'unorthodox transaction' exemption . . . is that the transaction must, in fact, be 'unorthodox' – i.e., not an ordinary cash-for stock transaction." (MBOT Reply at 5.) Mona's purchases and sales of Microbot stock were traditional buy-sale stock transactions – they did not occur in the context of a corporate takeover or other such scenario that has been recognized as unorthodox. Mona cannot credibly claim otherwise.

Mona points to *Portnoy v. Seligman & Latz, Inc.*, 516 F. Supp. 1188 (S.D.N.Y. 1981), to highlight the "'evolution of the Second Circuit's jurisprudence on section 16(b)'" in adopting a "'pragmatic'" approach that at times "'requires the court to explore beneath the surface to explain why a transaction within the literal terms of the statute should

not be treated as one.'" (MJP Opp. at 5 (quoting *Portnoy*, 516 F. Supp. at 1192-93).) Mona does not mention, however, that the *Portnoy* defendants escaped the strict grasp of § 16(b) because "this case involve[d] only one transaction attributable to them and . . . this transaction was only a sale of warrants, not an exercise of warrants followed by a profit taking." 516 F. Supp. at 1195. That is, both *Portnoy* and the "pragmatic" approach are inapposite here because *Portnoy* actually involved an unorthodox transaction – a "dealing[] in . . . warrants" structured as a single rather than pair of transactions[8] – instead of a traditional "cash-for-stock transaction[]." *Id.* Indeed, the *Portnoy* court made crystal clear that "no case either before or after *Kern County* has exempted cash-for-stock transactions from the automatic application of section 16(b). . . ." 516 F. Supp. at 1197 (quoting *Tyco Laboratories, Inc. v. Cutler-Hammer, Inc.*, 490 F. Supp. 1, 6-7 (S.D.N.Y. 1980)).[9]

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8. "To trigger section 16(b) liability there must be both a purchase and a sale" – i.e., a pair of transactions – to be "matched." *Chechele*, 758 F.3d at 471.

9. In *Tyco Laboratories*, the court rejected a shareholder's argument that a "control contest type of situation" rendered "unorthodox" their purchases and sales of "common stock in open market brokerage transactions for cash" and therefore warranted inquiry into whether the shareholder had access to inside information. The court explained that "what the Supreme Court actually stated is that a 'cash-for-stock' transaction is orthodox and results in automatic section 16(b) liability." *Tyco Laboratories*, 490 F. Supp. at 2, 6. Mona attempts at length to distinguish the instant case from *Tyco Laboratories* by arguing that he "had amassed his underlying position in Microbot based on an array of additional false and misleading statements made

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The last refuge to which Mona retreats is *American Standard, Inc. v. Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), which Mona argues is "most akin" to his situation. (MJP Opp. at 10.) There, the Second Circuit confronted the case of "a tender offeror who [did] not have access to inside information about the target company by virtue of his position as a 'beneficial owner,' coupled with an inability, as further evidenced by the vote on the merger, to affect the course of the target company." 510 F.2d at 1055. Finding the case's similarity to *Kern* "striking," the Second Circuit concluded that "the exchange of stock pursuant to the merger terms was not a 'sale' for § 16(b) purposes." *Id.* at 1053, 1055. Like *Kern* and unlike the instant case, *American Standard* involved "a takeover situation with a contest for control[,] a defensive merger that defeated the takeover bid," and a merger agreement that dictated the exchange of stock. *Id.* at 1052. But, with respect to "'garden-variety purchase and sale or sale and purchase within six months,'" the *American Standard* court reaffirmed what was true then and what is true now: § 16(b) operates as a "'crude rule of thumb'" on traditional cash-for-stock transactions. *Id.* at 1053 (quoting *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 162 (2d Cir. 1971), *aff'd sub nom. Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 93 S. Ct. 1736, 36 L. Ed. 2d 503 (1973)).

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by Microbot's officers, directors, agents, and in SEC filings over the previous two years." (MJP Opp. at 7.) Issuer fraud, however, is not a cognizable defense to imposition of § 16(b) liability, as the Court explains further below.

C. Mona's Equitable and Statutory Affirmative Defenses Are Unavailing

Mona asserts two affirmative defenses – unclean hands and windfall under § 28(a) of the Act. With respect to the former, Mona argues that "[i]t would be inequitable for [Microbot] to obtain 16(b) damages from [him] when his share purchases were undertaken on reliance of [Microbot]'s false and misleading statements, his sales were solely to avoid financial harm by [Microbot]'s abusive dilution tactics, and his net loss after exiting Microbot stock was in excess of $150,000." (Answer ¶ 26.) With regard to the latter, Mona claims that "Section 28(a) of the Securities Exchange Act limits the amount recoverable in any lawsuit for damages brought under the Act to 'a total amount [not] in excess of the actual damages to that person on account of the act complained of,'" and that Microbot "was not actually damaged." (Answer ¶¶ 27, 30 (quoting 15 U.S.C. § 78bb(a)(1)).)

Microbot maintains that generally there are no equitable defenses, such as unclean hands, to § 16(b) liability based on an issuer's actions or intentions. And, although conceding that the statutory windfall defense applies to "actual damages," Microbot claims that § 16(b) is a "prophylactic measure" to which § 28(a) does not apply. (MBOT Mem. at 9-10, 12-13.) Mona does not proffer any meaningful arguments in support of either of his affirmative defenses. Nor could he, as explained next.

Appendix E

1. Unclean Hands

Generally, unclean hands is an equitable defense that applies only to equitable claims. *See Henderson v. United States*, 575 U.S. 622, 622 n.1, 135 S. Ct. 1780, 191 L. Ed. 2d 874 (2015) ("The unclean hands doctrine proscribes equitable relief when, but only when, an individual's misconduct has 'immediate and necessary relation to the equity that he seeks.'") (quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245, 54 S. Ct. 146, 78 L. Ed. 293, 1934 Dec. Comm'r Pat. 639 (1933)); *Carmen v. Fox Film Corp.*, 269 F. 928, 931 (2d Cir. 1920) ("One who comes into equity must come with clean hands. . . ."). Microbot, however, does not seek equitable relief; it seeks legal relief.

Even assuming for the sake of argument that unclean hands can be a defense to Microbot's legal claim, courts in this District have resoundingly rejected the applicability of equitable defenses to § 16(b) claims. *See Huppe ex rel. WPCS International Inc. v. Special Situations Fund III QP, L.P.*, 565 F. Supp. 2d 495, 502 (S.D.N.Y. 2008) ("nothing in the statute permits the Court to consider as a mitigating factor the issuer's intent or any benefit inuring to the issuer, nor is there any equitable defense available based on such theories") (collecting cases), *aff'd*, 670 F.3d 214 (2d Cir. 2012); *Donoghue v. Natural Microsystems Corp.*, 198 F. Supp. 2d 487, 491 (S.D.N.Y. 2002) (In pari delicto "and other such equitable defenses are generally not available in actions under Section 16(b). . . . In fact, equitable defenses have been rejected in this Circuit even where the issuer participated in the transaction and where

a transaction occurred at the incentive of the issuer.") (collecting cases); *accord Analytical Surveys, Inc. v. Tonga Partners, L.P.*, No. 06-CV-2692, 2008 U.S. Dist. LEXIS 75459, 2008 WL 4443828, at *7 (S.D.N.Y. Sept. 29, 2008), *aff'd*, 684 F.3d 36 (2d Cir. 2012); *see also Texas International Airlines v. National Airlines, Inc.*, 714 F.2d 533, 536 (5th Cir. 1983) ("The case law uniformly rejects equitable defenses in section 16(b) cases. . . . Indeed, the courts have not accepted equitable defenses even in cases where the issuer participated in the transaction or where the transaction giving rise to the profit occurred at the incentive of the issuer itself.") (citing, *inter alia*, *Roth v. Fund of Funds, Ltd.*, 405 F.2d 421, 421-23 (2d Cir. 1968); *Magida v. Continental Can Co.*, 231 F.2d 843, 846 (2d Cir. 1956)).

Mona manages no more than an anemic response. First, he asserts that Microbot did not merely provide him with the "incentive" to trade; rather, it defrauded him into doing so. But none of the precedent as set forth above indicates that this distinction has any significance with respect to the viability of an equitable defense such as unclean hands to avoid liability under § 16(b), and Mona has not presented the Court with any such authority.[10] Second, Mona makes a half-hearted argument that *Analytical Surveys* is distinguishable because there "the Section 16(b) defendant was in full control of the transactions

10. The absence of an equitable defense, however, does not leave investors claiming fraud without a remedy. They may of course assert claims for fraud, assuming they can and do plead sufficient facts. As discussed below, Mona has not done so in this instance.

that formed the basis of its 16(b) liability" and could not establish the "two factors" of the unorthodox transaction exception. (MJP Opp. at 9-10.) That purported distinction, however, confuses two separate issues – the availability of equitable defenses and the applicability of the unorthodox transaction. Neither helps Mona here.

2. Windfall under § 28(a) of the Act

Section 28(a) of the Act states in relevant part that "[n]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in 1 or more actions, a total amount in excess of the actual damages to that person on account of the act complained of." 15 U.S.C. § 78bb(a)(1). Mona claims that § 16(b) imposes liability for actual damages and that Microbot as an issuer suffered no actual damages; consequently, under § 28(a), Microbot may not recover "a total amount . . . in excess of the actual damages" that it sustained – i.e., more than zero. (Answer ¶¶ 27-30.) In response, Microbot argues that § 16(b) is not a damages remedy but rather a "prophylactic measure"; and, alternatively, that there is no "existence or extent" of "damages" at all, only a "mechanical[]" calculation of profits. (MBOT Mem. at 12-13.) Section 28(a) therefore does not apply to Microbot's claim. Microbot is correct.

On the one hand, "the purpose of section 28(a) is to compensate civil plaintiffs for economic loss suffered as a result of wrongs committed in violation of the 1934 Act." *Osofsky v. Zipf*, 645 F.2d 107, 111 (2d Cir. 1981). On the other hand, in passing § 16(b), "Congress recognized

that short-swing speculation by stockholders with advance, inside information would threaten the goal of the Securities Exchange Act to 'insure the maintenance of fair and honest markets.'" *Kern*, 411 U.S. at 591 (quoting 15 U.S.C. § 78b). Congress therefore "'chose a relatively arbitrary rule capable of easy administration'" as "'[s]uch arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect.'" *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 422, 92 S. Ct. 596, 30 L. Ed. 2d 575 (1972) (quoting *Bershad v. McDonough*, 428 F.2d 693, 696 (7th Cir. 1970)). In other words, whereas the purpose of § 28(a) is "to compensate civil plaintiffs for economic loss," *Osofsky*, 645 F.2d at 111, § 16(b) is "a strict prophylactic rule" meant to ensure the integrity of the securities markets, *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 251, 96 S. Ct. 508, 46 L. Ed. 2d 464 (1976).

Disgorgement of short-swing profits pursuant to § 16(b) is thus a separate and independent remedy from any damages that may be available to an issuer seeking redress for insider misconduct. *See Rubenstein v. International Value Advisers, LLC*, 959 F.3d 541, 547 (2d Cir. 2020) ("Section 16(b) addresses only a narrow class of potential insider trading. . . . Trading that passes muster under Section 16(b) may not do so under Rule 10b-5."); *Steel Partners II, L.P. v. Bell Industries*, Inc. 315 F.3d 120, 127 (2d Cir. 2002) ("As we have noted, Section 16(b) cannot and does not seek to punish all possible abuses by an insider."). Furthermore, § 16(b) does not even refer to "damages"; rather, it requires a disgorgement of profit be made in service of what the prohibition was meant to

accomplish. *See* 15 U.S.C. § 78p(b) ("For the purpose of preventing the unfair use of information . . . any profit realized . . . shall inure to and be recoverable by the issuer. . . .").

Indeed, at least in the context of SEC enforcement actions, the Second Circuit has identified disgorgement as an entirely distinct remedy from compensatory damages. *See SEC. v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) ("Because disgorgement is not compensatory, it forces a defendant to account for all profits reaped through his securities law violations and to transfer all such money to the court, even if it exceeds actual damages to the victim.") (internal quotation marks and citation omitted); *SEC. v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) ("'[T]he primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched.'") (quoting *SEC. v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)); *SEC. v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) ("Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal.").

In short, § 28(a) and § 16(b) serve separate purposes and provide distinct remedies. Mona cites to no contrary authority, and his windfall argument is unavailing.

C. Calculating Mona's Short-Swing Profits

The final issue is how Mona's short-swing profits are to be calculated. The parties agree on the basic methodology: Mona's short-swing profits are to be calculated according to the lowest-in, highest-out method, which "has been consistently and diligently followed by courts in the Second Circuit." *Morales v. Consolidated Oil & Gas, Inc.*, No. 81-CV-4871, 1982 U.S. Dist. LEXIS 14567, 1982 WL 1328, at *4 (S.D.N.Y. July 17, 1982) (collecting cases); *see also Smolowe v. Delendo Corp.*, 136 F.2d 231, 239 (2d Cir. 1943) ("The only rule whereby all possible profits can be surely recovered is that of lowest price in, highest price out – within six months"). "[T]he trades must be matched in a manner that maximizes the disgorgeable amount. . . . This is accomplished by matching the highest sale prices with the lowest purchase prices within the six month period." *Segen ex re. KFx Inc. v. Westcliff Capital Management, LLC*, 299 F. Supp. 2d 262, 272 (S.D.N.Y. 2004). "Pursuant to this method of computation, [an insider's] short swing profits may be calculated by matching . . . his highest-priced and hence most profitable sales transactions . . . with the same number of shares purchased for the least cost. The remaining sales transactions that did not produce profits are dropped from the equation." *Donoghue v. MIRACOR Diagnostics, Inc.*, No. 00-CV-6696, 2002 U.S. Dist. LEXIS 2461, 2002 WL 233188, at *3 (S.D.N.Y. Feb. 11, 2002).

As set forth earlier, the following table summarizes Mona's relevant purchases and sales while a beneficial owner of more than 10% of Microbot stock:

Appendix E

	Date	Transaction	Shares	Price
(1)	Nov. 19, 2018	Purchase	2,400	$2.99
(2)	Nov. 21, 2018	Purchase	24,873	$2.21
(3)	Nov. 21, 2018	Sale	6,309	$2.96
(4)	Nov. 26, 2018	Purchase	37,986	$1.95
(5)	Jan. 8, 2019	Sale	2,269	$2.70
(6)	Jan. 9, 2019	Purchase	14,280	$2.19
(7)	Jan. 9, 2019	Sale	1,280	$2.27
(8)	Jan. 14, 2019	Purchase	1,773	$6.43
(9)	Jan. 14, 2019	Sale	281,773	$8.16

The short-swing window consists of the transactions from November 19, 2018, to January 14, 2019. In the short-swing window, Mona sold a total of 291,631 shares but purchased only 81,312 shares. Thus, only 81,312 shares are to be matched. The resulting matching is: (81,312 * $8.16) - ((37,986 * $1.95) + (14,280 * $2.19) + (24,873 * $2.21) + (2,400 * $2.99) + (1,773 * $6.43)) = $484,614.30.[11] That is the amount of Mona's short swing profits.

Although Mona does not disagree with the lowest-purchase, highest-sale methodology, he contests the length of the short-swing window. Specifically, Mona contends

11. Microbot presented calculations that do not follow the proper methodology. Accordingly, the Court has calculated the short-swing profits pursuant to the methodology directed by the case law. That correction, however, favors Microbot insofar as it results in a higher calculation of profits than Microbot's incorrect calculation.

the appropriate trade date to use is the settlement date, not the execution date, which has the benefit to Mona of accounting for Microbot's "dilutive activity":

> Mona's January 14, 2019 transactions, during which he allegedly exited a greater than 10% position, did not settle until January 17, 2019, three days after those trades were made. Prior to the settlement date, on January 15, 2019, Microbot registered a direct offering which increased the total shares outstanding. . . . As a result, by the time all of Mona's January 14 trades settled on January 17, Mona held a greater than 10% position in Microbot for less time (and a fewer number of trades) than Plaintiff calculates, because his holdings . . . represented a smaller fraction of the (increased) outstanding stock as of January 16. Preliminary estimates . . . indicate that based on MBOT's dilutive activity, twelve of Mona's trades on January 14, 2019, representing the sale of 34,500 MBOT shares, should not be included in the short swing window.

(MJP Opp. at 12-13.)

As Microbot correctly responds, however, "it is well-settled that the date of a securities transaction for Section 16 purposes is the execution date, and not the settlement date." (MBOT Reply at 13.) The Court recently reaffirmed that principle, recognizing that "the operative date for Section 16(b) purposes is the date of execution,

not settlement." *Chechele v. Dundon*, No. 19-CV-10544, 2020 U.S. Dist. LEXIS 148049, 2020 WL 4748298, at *4 (S.D.N.Y. Aug. 17, 2020) (Daniels, J.) (citing *Donoghue v. Patterson Companies, Inc.*, 990 F. Supp. 2d 421, 426 (S.D.N.Y. 2013)). "In determining when the sale occurred, the 'critical moment' is the 'point at which the investor becomes irrevocably committed to the transaction and, in addition, no longer has control over the transaction in any way that could be turned to speculative advantage by the investor.'" *Rubenstein v. vTv Therapeutics, Inc.*, No. 15-CV-9752, 2017 U.S. Dist. LEXIS 47926, 2017 WL 1194688, at *3 (S.D.N.Y. March 30, 2017) (quoting *Prager v. Sylvestri*, 449 F. Supp. 425, 431-33 (S.D.N.Y. 1978)); *cf. Rubenstein*, 2017 U.S. Dist. LEXIS 47926, 2017 WL 1194688 at *4 ("Defendants were 'irrevocably bound' to transfer the shares at the time they agreed to the terms of the Letter Agreement, which contractually committed them to providing the predetermined value in securities in the event of an IPO. . . . [T]he relevant date of sale in this context is the date of the contract's execution."); *Donoghue*, 990 F. Supp. 2d at 424 (In "cases involving prepaid variable forward contracts and Section 16(b) . . . the relevant purchase or sale date for the contract was that of the contract's execution.").

Here, the operative date of Mona's trades in dispute is the date on which Mona executed those trades through his broker dealer: January 14, 2019. Consequently, the calculation of § 16(b) damages is unaffected by Microbot's "dilutive activity," which according to Mona took place

on January 15, 2019.[12] There thus is no issue of fact to preclude granting Microbot judgment on the pleadings in the amount of $484,614.30, representing Mona's prohibited short-swing profits.[13]

Motion to Dismiss Mona's Counterclaim

Mona accuses Microbot of securities fraud. He alleges that between May 2017 and February 2018, Microbot, Microbot's CEO, and Microbot's agents made several material misstatements or omissions "about Microbot's competitive position in the market and [its] financial health and cash position," which fraudulently induced Mona into "accumulating and holding Microbot stock" as part of "a

12. Mona also argues that judgment on the pleadings is premature "[b]ecause Plaintiff pleaded joint, several, and alternative liability as between Alliance and Mona, a factual allegation which Mona disputes, unless and until Plaintiff (1) dismisses Alliance from the case, or (2) Alliance wins its pending motion for summary judgment." (MJP Opp. at 12.) Since the Court already has granted Alliance summary judgment and dismissed Alliance from the case with prejudice, this argument is moot.

13. The Court acknowledges § 16(b)'s "crude," "harsh," and "Draconian" strict liability regime. *Rosen v. Price*, No. 95-CV-5089, 1997 U.S. Dist. LEXIS 10274, 1997 WL 401793, at *4 (S.D.N.Y. July 16, 1997) (internal quotation marks omitted). Indeed, "an individual may be charged with a Section 16(b) 'profit' even when his or her relevant trading actually resulted in a substantial financial loss" – just as is the case here. *Lowinger v. Morgan Stanley & Co. LLC*, 841 F. 3d 122, 129 n.6 (2d Cir. 2016). But whether it is wise and just for a trader like Mona to be swept up in such a statutory scheme is a question that must be left to the Legislative Branch to resolve.

systematic cycle to manipulate [Microbot's] stock price." (Counterclaim ¶¶ 35-36.) As explained by Mona,

> This manipulative conduct involved first, the company releasing some "positive news" to the market. Next, shareholders (sometimes including Mona) would purchase stock in response to the news, which would have the effect of bidding up the share price. Finally, Microbot would take advantage of the increased share price by releasing new shares into the market, diluting its shareholders and diminishing the value of his shares, thereby harvesting from the market all value created by the positive news and using it to, among other things, pay ordinary expenses and compensate employees and executives.

(Counterclaim ¶ 36.) By the time Mona completely exited his position in Microbot, he lost $150,954. (Counterclaim ¶ 78.)

At issue are the following alleged material misstatements or omissions:

1. Microbot's May 15, 2017, August 14, 2017, and November 14, 2018 SEC filing statements that it had sufficient capital to fund operations for the following twelve months; Gadot's August 14, 2017 conference call statement that Microbot had sufficient capital to fund operations for the following twenty-four to thirty months;

2. Gadot's August 14, 2017 conference call statement that Microbot was five years ahead of its competition, and, after the FDA approved Alcyone's competing device on November 15, 2017, Gadot's omission to correct this "five-year head start" statement;

3. Gadot's February 1, 2018 conference call statement that Microbot shares were "extremely cheap"; and

4. Statements made by Jeremy Roe during an August 7, 2017 call to Mona (Microbot stock was "lightning in a bottle"; "the shares were going to get to $10" from $1; Roe had "just purchased an additional 10,000 shares in the company") and by Tony Altavilla during a October 2, 2017 call to Mona (Gadot was "out in Minneapolis on business, meeting two Fortune 500 companies"; Altavilla expected Microbot "to sign an SCS partnership any day").

Microbot argues that these statements are "forward looking" and therefore protected by the safe harbor provisions of the Public Securities Litigation Reform Act (the "PSLRA"). Alternatively, they are puffery, non-actionable opinion, time-barred, or not attributable to Microbot. Taking as true Mona's allegations of the statements made, Microbot is largely correct. None of the statements are sufficient to sustain Mona's securities fraud claims.

A. Section 10(b) and Rule 10b-5

Section 10(b) of the Act makes it unlawful to "use or employ, in connection with the purchase or sale of

any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). And Rule 10b-5 states in relevant part,

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . [t]o employ any device, scheme, or artifice to defraud, . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

To state a claim under § 10(b) and Rule 10b-5, a plaintiff must plead "(1) a material misrepresentation (or omission); (2) scienter, i.e., a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance . . . ; (5) economic loss; and (6) loss causation, i.e., a causal connection between the material misrepresentation and loss." *Dura Pharamceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (internal quotation marks, citations, and emphasis omitted).

Under the PSLRA's stringent pleading standards, a plaintiff also must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief . . . state with particularity all facts on which that belief is formed"; in addition, the plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b). The Court will analyze the sufficiency of Mona's claims, addressing in turn the four groups of alleged misstatements.

B. Sufficiency of Capital to Fund Operations

Mona alleges that all statements made by Microbot and Gadot about Microbot's financial health and ability to fund operations for the foreseeable future were false when made. Microbot knew that its May 15, 2017 filing statement was false when made because Microbot was "preparing to raise millions of dollars in additional funds." (Counterclaim ¶ 46.) Microbot also knew that its August 14, 2017 filing statement was false when made due to "the decline in [Microbot's] share price caused by Alpha's sale of large blocks of shares and Microbot's misrepresentations to Sabby" – and "as subsequent [dilution] events would reveal." (Counterclaim ¶ 53.) And Gadot knew that his August 14, 2017 conference call statement was false when made "as [Microbot's] later manipulative dilutive activity well within the 24-30 month period would reveal." (Counterclaim ¶ 61.) Finally, Mona asserts, Microbot knew that its November 14, 2018 filing statement was false when

made "because management was actively preparing to raise more capital and dilute shareholders yet again." (Counterclaim ¶ 72.)

Microbot maintains that all of the challenged statements are protected by the PSLRA's safe-harbor provisions because they are forward-looking and accompanied by meaningful cautionary statements. In opposition, Mona claims that Microbot's cautionary language is mere boilerplate. Upon review of the case law and the relevant SEC filings, the Court agrees with Microbot that these sufficiency-of-capital statements are shielded by the PSLRA's safe harbor.

Under the PSLRA's safe harbor, "a defendant is not liable if the forward-looking statement is identified and accompanied by meaningful cautionary language *or* is immaterial *or* the plaintiff fails to prove that it was made with actual knowledge that it was false or misleading." *Slayton v. American Express Co.*, 604 F.3d 758, 766 (2d Cir. 2010); *see* 15 U.S.C. § 78u-5(c). "Because '[t]he safe harbor is written in the disjunctive,' a forward-looking statement is protected under the safe harbor if any of the three prongs applies." *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 245-46 (2d Cir. 2016) (quoting *Slayton*, 604 F.3d at 766).

The statements at issue regarding Microbot's sufficiency of capital are forward-looking statements as defined by the PSLRA. The PLSRA includes several definitions of a forward-looking statement, including "a statement containing a projection of revenues, income

(including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items"; and "a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission." 15 U.S.C. § 78u-5(i)(1)(A), (C).

Each of the statements made by Microbot and Gadot projects that Microbot will have enough capital on hand to fund operations for a year or more into the future. As such, the statements fit comfortably within the definitions of forward-looking statements, particularly as "projection[s] of . . . capital expenditures" and "statement[s] of future economic performance . . . contained in a discussion and analysis of financial condition. . . ." *See In re SunEdison, Inc. Securities Litigation*, 300 F. Supp. 3d 444, 466 (S.D.N.Y. 2018) ("'[w]e expect cash on hand' and other funding sources to 'meet our capital needs for the remainder of 2015' is a . . . forward-looking statement"); *Gissin v. Endres*, 739 F. Supp. 2d 488, 507 (S.D.N.Y. 2010) ("alleged misstatements . . . cast in predictive terms . . . are by definition forward-looking").

The next question is whether the forward-looking statements in question are identified as such. The Court looks to "the facts and circumstances of the language used in a particular report" with a focus on "[t]he use of linguistic cues like 'we expect' or 'we believe' . . . combined with an explanatory description of the company's intention to thereby designate a statement as

forward-looking. . . ." *Slayton*, 604 F.3d at 769 (internal quotation marks omitted). Here, each of Microbot's statements is introduced by "Microbot[/it] believes," and each is closely preceded by a section clearly demarcated "Forward Looking Statements" in which the reader is alerted that "[f]orward-looking statements, which involve assumptions and describe our future plans, strategies, and expectations, are generally identifiable by the use of the word[] . . . 'believe,' . . . or the negative of [this] word[ ] or other variations on [this] word[ ] or comparable terminology." (Tauber Decl., Ex. B, 5/15/2017 Form 10-Q, at 22, 25; Ex. D, 8/14/2017 Form 10-Q, at 20, 22; Ex. G, 11/14/2018 Form 10-Q, at 16, 23.) In other words, Microbot's statements on sufficiency of capital are clearly identified as forward-looking statements. *See Gissin*, 739 F. Supp. 2d at 507 ("[t]he use of linguistic cues . . . combined with an explanatory description of the company's intention to thereby designate a statement as forward looking satisfies safe harbor") (internal quotation marks omitted); *accord Steamfitters Local 449 Pension Plan v. Skechers U.S.A., Inc.*, 412 F. Supp. 3d 353, 361 (S.D.N.Y. 2019); *In re Barrick Gold Corp. Securities Litigation*, 341 F. Supp. 3d 358, 374-75 (S.D.N.Y. 2018).

As for Gadot's oral, forward-looking statement made during the investor conference call, the PSLRA requires an accompanying statement that the particular oral statement is forward-looking. 15 U.S.C. § 78u-5(c)(2)(A)(i). Typically, at the beginning of an investor call, a representative of a company will recite a safe harbor statement not only alerting listeners that forward-looking statements are about to be made, but also referring

listeners to the company's SEC filings setting forth the appropriate cautionary language. Courts in this District recognize that this industry practice suffices both to identify a forward-looking statement and to attach cautionary language to that statement.[14] *See In re Textron, Inc. Securities Litigation*, No. 19-CV-7881, 2020 U.S. Dist. LEXIS 126971, 2020 WL 4059179, at *5 n.2, *11 (S.D.N.Y. July 20, 2020); *Steamfitters Local 499 Pension Plan v. Skechers U.S.A., Inc.*, 412 F. Supp. 3d 353, 364-65 (S.D.N.Y. 2019); *City of Providence v. Aeropostale, Inc.*, No. 11-CV-7132, 2013 U.S. Dist. LEXIS 44948, 2013 WL 1197755, at *12 n.1 (S.D.N.Y. March 25, 2013); *Fort Worth Employers' Retirement Fund v. Biovail Corp.*, 615 F. Supp. 2d 218, 232-33 (S.D.N.Y. 2003); *see also City of Austin Police Retirement System v. Kinross Gold Corp.*, 957 F. Supp. 2d 277, 303 (S.D.N.Y. 2013) (collecting cases). That is precisely what happened here. At the beginning of the call, the audience was informed that "[a]ll statements in this conference call other than historical facts are forward-looking statements" and "may involve and are subject to . . . the risk factors and other qualifications contained in the company's Form 10-K that was filed with the Securities and Exchange Commission on 21 March [2017] and the [Form] 10-Q which was filed earlier today as well as other documents filed with the SEC." (Tr. 1-2.[15])

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14. Of course, the speaker may make cautionary statements during the call itself. *See Wilbush v. Ambac Financial Group, Inc.*, 271 F. Supp. 3d 473, 481-82 (S.D.N.Y. 2017); *In re Carbo Ceramics, Inc. Stock and Options Securities Litigation*, No. 12-CV-1034, 2013 U.S. Dist. LEXIS 91388, 2013 WL 3242352, at *5-6 (S.D.N.Y. June 26, 2013).

15. "Tr." refers to the transcript of Microbot's Investor Conference Call dated August 14, 2017. (Dkt. 103-1.) Microbot

Thus, Gadot's oral statement on sufficiency of capital also is sufficiently identified as a forward-looking statement.

The last question is whether each of the challenged statements about capital sufficiency is accompanied by "meaningful cautionary language." Cautionary language is "meaningful" when it is "not boilerplate and convey[s] substantive information." *Slayton*, 604 F.3d at 772.

> Cautionary language must be extensive and specific. A vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the prospectus which the plaintiffs challenge. . . . The requirement for "meaningful" cautions calls for "substantive" company-specific warnings based on a realistic description of the risks applicable to the particular circumstances, not merely a boilerplate litany of generally applicable risk factors.

Id. (first quoting *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 256 (3d Cir. 2008); and then quoting *Southland Securities Corp. v. INSpire Insurance Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2004)) (internal

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submitted this transcript following oral argument in response to the Court's request to do so.

quotation marks omitted). "To determine whether cautionary language is meaningful, courts must first 'identify the allegedly undisclosed risk' and then 'read the allegedly fraudulent materials – including the cautionary language – to determine if a reasonable investor could have been misled into thinking that the risk that materialized and resulted in his loss did not actually exist.'" *In re Delcath Systems, Inc. Securities Litigation*, 36 F. Supp. 3d 320, 333 (S.D.N.Y. 2014) (quoting *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 359 (2d Cir. 2002)). "Plaintiffs may establish that cautionary language is not meaningful 'by showing, for example, that the cautionary language did not expressly warn of or did not directly relate to the risk that brought about plaintiffs' loss.'" *Lopez v. Ctpartners Executive Search Inc.*, 173 F. Supp. 3d 12, 25 (S.D.N.Y. 2016) (quoting *Halperin*, 295 F.3d at 359).

Here, the "allegedly undisclosed risk" was that Microbot might not have enough cash on hand to fund operations and therefore might need to issue new shares to cover the shortfall. Upon reviewing the cautionary language accompanying each of Microbot's forward-looking statements about capitalization, the Court finds that Mona was both explicitly warned that Microbot planned to raise capital through equity issuances, and directly informed of the liquidity risks particular to Microbot that turned this plan into a near certainty. In addition, Mona was alerted through cautionary language that was consistently "extensive," "specific," "substantive," and "tailored." As a result, Mona, if acting as a reasonable investor, could not have been misled into thinking that Microbot's allegedly undisclosed risk did not exist. *See*

Olkey v. Hyperion 1999 Term Trust, Inc., 98 F.3d 2, 5 (2d Cir. 1996) (affirming dismissal where "prominent and specific" cautionary language "warn[ed] investors of exactly the risk the plaintiffs claim was not disclosed"); *Police and Fire Retirement System of the City of Detroit v. La Quinta Holdings Inc.*, No. 16-CV-3068, 2017 U.S. Dist. LEXIS 221703, 2017 WL 4082482, at *5 (S.D.N.Y. 2017) ("a securities fraud claim for misrepresentations or omissions does not lie when the company 'disclosed the very . . . risks about which [a plaintiff] claim[s] to have been misled'") (quoting *Ashland Inc. v. Morgan Stanley & Co., Inc.*, 652 F.3d 333, 338 (2d Cir. 2011)).

For instance, Microbot's May 15, 2017 statement is both closely preceded and followed by language warning that Microbot "has funded its operations through the issuance of capital stock" and "plans to continue to fund its research and development and other operating expenses . . . through future issuances of . . . equity securities," which "could result in additional dilution to Microbot's shareholders"; disclosing that Microbot "has never been profitable and has incurred significant operating losses in each year since inception"; projecting that Microbot will continue to incur "increasing operating losses for at least the next several years" and require "substantial additional capital to continue its clinical development and potential commercialization activities"; and setting forth Microbot's liquidity position as of the latest financial quarter ("$4,790,000, consisting primarily of cash and cash equivalents"). (Tauber Decl., Ex. B, 5/15/2017 Form 10-Q, at 22, 25.)

Appendix E

The language accompanying Microbot and Gadot's August 14, 2017 statements is substantially the same: Microbot again reminds investors that it has never been profitable, that it consistently has incurred negative cash flows from operating activities, that it expects to continue facing increasing operational costs, and that it plans to continue funding its operating expenses through future issuances of equity securities – which, of course, could further dilute Microbot's shareholders. (*See* Tauber Decl., Ex. D, 8/14/2017 Form 10-Q, at 20, 22-23.) In a note to Microbot's "Interim Condensed Consolidated Financial Statements," Microbot also reminds investors that it has issued a convertible promissory note to Alpha that "is convertible into [] Common Stock any time after November 28, 2017 and until the maturity date of November 28, 2019." (Tauber Decl., Ex. D, 8/14/2017 Form 10-Q, at 11).) Under "Part II – Other Information," "Item 1. Legal Proceedings," Microbot further reminds investors that Sabby is suing Microbot for breach of the SPA and seeking rescission of the SPA, return of the $3,375,000 purchase price, and "damages . . . to exceed $1 million." (Tauber Decl., Ex. D, 8/14/2017 Form 10-Q, at 25.) In other words, contrary to what Mona suggests, Microbot fully disclosed the additional liquidity risks posed by the terms of its convertible note to Alpha as well as the potential monetary damages it was facing as a result of Sabby's suit for breach of the SPA.

Finally, Microbot's November 14, 2018 statement likewise is accompanied by cautionary language substantially similar to that found in Microbot's May 15, 2017 Form 10-Q. (*See* Tauber Decl., Ex. G, 11/14/2018

Form 10-Q, at 22-23.) Mona argues that this statement "was false at the time it was made[ ] because management was actively preparing to raise more capital and dilute shareholders yet again." (Counterclaim ¶ 72.) In support, Mona cites to Microbot's amended preliminary prospectus filed on November 19, 2018, announcing that Microbot would be offering about six million new shares for sale. (Counterclaim ¶ 74.) Again, however, Microbot fully disclosed its liquidity risks and capital-raising plans well in advance – not only in its November 14, 2018 Form 10-Q (*see* Tauber Decl., Ex. G, 11/14/2018 Form 10-Q, at 22-23), but in past filings with the SEC (*see* Tauber Decl., Ex. B, 5/15/2017 Form 10-Q, at 22, 25; Ex. D, 8/14/2017 Form 10-Q, at 20, 22-23).[16]

Mona likens the cautionary language used by Microbot to that in *In re Vivendi*. There, the Second Circuit found that there was sufficient evidence for a reasonable jury to conclude that the forward-looking statements in question were not accompanied by meaningful cautionary language. Specifically, the language warned that an "inability to identify, develop and achieve success for new products, services and technologies; increased competition and its effect on pricing, spending, third-party relationships and revenue; [and] inability to establish and maintain relationships with commerce, advertising, marketing,

16. Mona alleges that Microbot filed its first amended preliminary prospectus "on November 19, 2018, on the *very same day* the November 10-Q was filed." (Counterclaim ¶ 74.) But Microbot filed its Form 10-Q on November 14, 2018, five days before that. (Counterclaim ¶ 72; Tauber Decl., Ex. G, 11/14/2018 Form 10-Q.)

technology, and content providers" were factors that "could cause actual results to differ materially from those described in the forward-looking statements." *In re Vivendi*, 838 F.3d at 247. The court held that such "garden-variety business concerns that could affect any company's financial well-being" did "not bear even tangentially on Vivendi's liquidity risk," failed to meaningfully caution against reliance on Vivendi's statements regarding its free cash flow, and therefore was not meaningful cautionary language. *Id.*

Here, in contrast, Microbot's disclosures state that it had "no products approved for commercial sale"; as such, it would require "substantial additional capital" to fund "commercialization activities," and it planned to fund these R&D and other operating expenses through equity issuances, which could further dilute shareholders. (MBOT Mem. at 17 (quoting Tauber Decl., Ex. B, 5/15/2017 Form 10-Q, at 25; Ex. D, 8/14/2017 Form 10-Q, at 23; Ex. G, 11/14/2018 Form 10-Q, at 23).) These statements are supplemented by other meaningful cautionary language that Microbot does not mention. For instance, because Microbot "has no products approved for commercial sale," it "has not generated any revenues from product sales since its inception." Rather, it "has raised cash proceeds . . . to fund operations[ ] primarily from government grants, loans, and private placement offerings of debt and equity securities." Furthermore, Microbot "has never been profitable and has incurred significant operating losses in each year since inception" ("negative cash flows from operating activities") and "expects to incur . . . increasing operating losses for at least the next several

years." (Tauber Decl., Ex. B, 5/15/2017 Form 10-Q, at 22, 25; Ex. D, 8/14/2017 Form 10-Q, at 20, 22; Ex. G., 11/14/2018 Form 10-Q, at 22.) This language – alerting investors that Microbot has never generated revenue, relied primarily on government grants and equity issuances for cash flow, and consistently incurred significant negative cash flows owing to operating losses (and only expects those losses to increase) – provides reasonable investors with ample basis to refrain from relying on Microbot's statements regarding its sufficiency of capital for future operating expenses.

These cautionary statements are not vague and generalized platitudes as the Second Circuit found insufficient in *Vivendi*. Instead, they bear directly on Microbot's liquidity risk and potential dilution of shares, precisely the concern at the heart of Mona's claims. *See In re SunEdison*, 300 F. Supp. 3d at 481-83 ("we continue to incur significant indebtedness to fund our operations"; "we expect our operations . . . to require substantial cash expenditures"; "we have . . . incurred losses and used substantial cash in our operating activities and we expect to continue to incur losses and use cash in our operating activities"; and "[w]e will need to raise additional funds . . . to meet the operating and capital needs of our . . . business . . . in the form of . . . project financing or equity" were "meaningful cautionary statements" concerning company's liquidity over the coming year); *In re OPUS360 Corp. Securities Litigation*, No. 01-CV-2938, 2002 U.S. Dist. LEXIS 18558, 2002 WL 31190157, at *5 (S.D.N.Y. Oct. 2, 2002) ("'We . . . have never been profitable' [and] 'We . . . expect to incur losses for the foreseeable future'

. . . placed reasonable investors on notice that [] future forecasting concerning [the company's] financial condition should not be relied upon in making a decision to invest."); *see also In re Sanofi Securities Litigation*, No. 13-CV-8806, 2015 U.S. Dist. LEXIS 11209, 2015 WL 365702, at *21 (S.D.N.Y. Jan. 28, 2015) ("These statements conveyed substantive information about the risk that ultimately materialized. As such, they were meaningful cautionary language, not mere boilerplate.").

In short, Microbot and Gadot's alleged material misstatements or omissions regarding sufficiency of capital all are forward-looking statements identified as such and accompanied by meaningful cautionary language. Consequently, they are protected by the PSLRA's safe harbor provisions, and the Court need not and does not reach the question whether they were material or whether they were made with actual knowledge of falsity.

C. Gadot's "Five-Year Head Start" Statement Is Not Mere Puffery; But Mona's Claims Based on That Statement Are Time-Barred

Mona next argues that Gadot's August 14, 2017 conference call statement that Microbot had a "five-year head start on competitors" was false, and Gadot knew it was false when made, because on July 3, 2017, Alcyone had submitted a directly competing device for FDA approval. Moreover, Gadot did not correct his statement any time after November 15, 2017, when the FDA actually approved the device. Microbot argues that Gadot's statement is non-actionable puffery and, at any rate, both the statement

and Gadot's subsequent failure to correct it are time-barred as Mona brought his action more than two years after November 15, 2017, when a reasonably diligent investor would have discovered Alcyone's FDA approval by contemporaneous press releases.

Viewed in context, the Court cannot conclude that Gadot's head-start statement is mere puffery; nevertheless, Mona's claims relating to that statement are time-barred.

1. Puffery

Statements are non-actionable "puffery" when they are "'too general to cause a reasonable investor to rely upon them.'" *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014) (quoting *ECA, Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009)). In making this determination, "there is no definitive test to determine how vague a statement must be to qualify as puffery," but "courts have focused on the imprecision of statements and whether such statements relate to future expectations." *Nguyen v. New Link Genetics Corp.*, 297 F. Supp. 3d 472, 488-89 (S.D.N.Y. 2018) (collecting cases). Archetypal examples of puffery include "statements [that] are explicitly aspirational, with qualifiers such as 'aims to,' 'wants to,' and 'should.'" *City of Pontiac*, 752 F.3d at 183. Whether certain statements constitute puffery also entails looking at the "context" in which they are made, including the "specific[ity]" of the statements and whether the statements are "clearly designed to distinguish the

company" to the investing public in some meaningful way. *Indiana Public Retirement System v. SAIC, Inc.*, 818 F.3d 85, 98 (2d Cir. 2016); *see also In re Petrobras Securities Litigation*, 116 F. Supp. 3d 368, 381 (S.D.N.Y. 2015) (collecting cases).

On the one hand, Gadot's statement is not absolute but rather qualified by "probably," making it more of a boast and less a matter of fact. But, taken in context, Gadot's statement clearly is intended to specifically and meaningfully distinguish Microbot as the only player in the SCS/occlusion space at the time and therefore years ahead of the competition:

> So let's define competitors. . . . If you're talking about the direct competitor, something that will prevent occlusion, there is really, really nothing out there. There is one other company which is out . . . now in California. But they're really not focusing on the development of a Self-Cleaning Shu[n]t. So we're really playing in a blue ocean right now where we can – if we can bring the value then we are the leaders in that space. . . .
>
> So . . . the big companies actually not only they don't have deeper pockets but recently Codman was bought by Integra so one of the competitors is out of the market integrated into Integra. . . . Now there are a couple of IPs that are in academic settings but nothing is happening with them. So we probably have a five year head start on any other competitor.

(Tr. 14-16.) The Court thus cannot conclude that Gadot's head-start statement is non-actionable puffery. Nonetheless, Mona's claims based on that statement are time-barred.

2. Time-Barred

"[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of – (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). "[A] cause of action accrues (1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation' – whichever comes first." *Merck & Co. v. Reynolds*, 559 U.S. 633, 637, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010). "[T]he reasonably diligent plaintiff has not 'discovered' one of the facts constituting a securities fraud violation until he can plead that fact with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." *City of Pontiac*, 637 F.3d at 175. "Only after a plaintiff can adequately plead his claim can that claim be said to have accrued, and only after a claim has accrued can the statute of limitations on that claim begin to run." *Id.* "[T]he limitations period commences not when a reasonable investor would have begun investigating, but when such a reasonable investor conducting such a timely investigation would have uncovered the facts constituting a violation." *Id.* at 174.

Mona alleges that Gadot's head-start statement was false, and Mr. Gadot knew it was false at the time he made it; in addition, "at no time did Mr. Gadot correct his false statement made to Mona and other investors, thereby making an additional, material omission." (Counterclaim ¶¶ 57-58.) The Court must therefore consider when Mona could have adequately pleaded falsity of the head-start statement, and Gadot's knowledge of that falsity, such that Mona's claims accrued and the statute of limitations on those claims began running.

On November 15 and 16, 2017, multiple press releases announced that Alycone had secured FDA approval for its competing product.[17] (*See* Tauber Decl., Ex. E.) Reported only three months after Gadot made his statement, this information bears directly on Microbot's then-competitive position and would have sufficed to alert a reasonable investor of the probability that Gadot's head-start statement was a misrepresentation. That is, soon after the Alycone press releases issued, Mona, acting as a reasonably diligent investor, would have learned of facts

17. "For purposes of evaluating Defendants' timeliness argument, the Court may, and does, take judicial notice of the fact of these news reports and testimony, 'without regard to the truth of their contents.'" *DoubleLine Capital LP v. Odebrecht Finance, Ltd.*, 323 F. Supp. 3d 393, 436 (S.D.N.Y. 2018) (quoting *Staehr v. Hartford Financial Services Group*, 547 F.3d 406, 425 (2d Cir. 2008)). *See also Staehr*, 547 F.3d at 427 ("It is unremarkable that courts consider the extent of media coverage in deciding when inquiry notice for securities fraud claims was triggered."); *LC Capital Partners, LP v. Frontier Insurance Group, Inc.*, 318 F.3d 148, 155 (2d Cir. 2003) (taking judicial notice of news article in evaluating whether plaintiffs had inquiry notice).

enabling him to plead the same claims as he does now with respect to the head-start statement. *See Schiro v. Cemex, S.A.B. de C.V.*, 438 F. Supp. 3d 194, 200-01 (S.D.N.Y. 2020) (press release announcing internal probe "mark[ed] the date by which Plaintiffs believed 'the truth [began] to emerge' and the statute of limitations began to run") (citing *Dodds v. Cigna Securities Inc.*, 12 F.3d 346, 350 (2d Cir. 1993)); *Fogel v. Wal-Mart de México SAB de CV*, No. 13-CV-2282, 2017 U.S. Dist. LEXIS 26976, 2017 WL 751155, at *9 (S.D.N.Y. Feb. 27, 2017) (reasonably diligent plaintiff would have discovered necessary facts "upon . . . publication" of newspaper article exposing internal investigation), *aff'd sub nom. Fogel v. Vega*, 759 F. App'x 18 (2d Cir. 2018); *In re Wachovia Equity Securities Litigation*, 753 F. Supp. 2d 326, 371 (S.D.N.Y. 2011) (barring equitable tolling, statute of limitations "likely" would have triggered on date of bailout announcement).

Mona argues that whether he was reasonably diligent in investigating his claims is a question of fact inappropriate for resolution on a motion to dismiss. But courts routinely confront and resolve the question at this juncture. *See LC Capital Partners, LP*, 318 F.3d at 156 ("'Where . . . the facts needed for determination of when a reasonable investor of ordinary intelligence would have been aware of the existence of fraud can be gleaned from the complaint and papers . . . integral to the complaint, resolution of the issue on a motion to dismiss is appropriate.'") (quoting *Dodds*, 12 F.3d at 352 n.3); *Dodds*, 12 F.3d at 352 n.3 (the "suggestion that the question of constructive notice is an improper subject for resolution as a matter of law is contradicted by a vast number of cases in this circuit resolving these issues at the pleading stage").

Mona also argues that it would go too far for this Court to expect a reasonably diligent investor "to perform industry-wide due diligence to investigate every competitor of any company they seek to invest in." (MTD Opp. at 14.[18]) Similarly, posits Mona, a rule that "false and misleading statements are not actionable if a lay investor could have located information that contradicted the statement . . . would enshrine a license to deceive." (MTD Opp. at 15.) The Court agrees. But that is not what the law demands, and it is not the standard to which this Court holds Mona.

Rather, *City of Pontiac* instructs the Court to consider whether a reasonably diligent plaintiff investigating Gadot's claim that Microbot had a "five-year head start" on its competitors would have discovered the press releases and the corresponding facts necessary to properly plead a Rule 10b-5(b) claim on or soon after November 15 or 16, 2017. That question having been answered in the affirmative, Mona should have filed his claims no later than or shortly after November 15 or 16, 2019. 28 U.S.C. § 1658(b). As Mona filed on February 4, 2020, months later, his claims that Gadot made and failed to correct the five-year head-start statement are time-barred.

D. Gadot's "Extremely Cheap" Statement Was Non-Actionable Opinion

Mona next argues that Gadot's February 1, 2018 conference call statement that Microbot shares were

18. "MTD Opp." means Mona's Opposition to Plaintiff's Motion to Dismiss Mona's § 10(b) Counterclaim. (Dkt. 89.)

"extremely cheap" was false when Gadot made it and Gadot knew it was false when made "because Microbot shares were in the middle of a steady decline." (Counterclaim ¶¶ 62, 64.) Microbot contends that Gadot's statement was non-actionable opinion. Microbot is correct, and Mona does not say otherwise in reply.

"[L]iability for making a false statement of opinion may lie if either 'the speaker did not hold the belief she professed' or 'the supporting fact she supplied were untrue.'" *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016) (quoting *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 185-86, 135 S. Ct. 1318, 191 L. Ed. 2d 253 (2015)). Additionally, "opinions, though sincerely held and otherwise true as a matter of fact, may nonetheless be actionable if the speaker omits information whose omission makes the statement misleading to a reasonable investor. . . . The core inquiry is whether the omitted facts would 'conflict with what a reasonable investor would take from the statement itself.'" *Id.* (quoting *Omnicare*, 575 U.S. at 189). "In assessing what a reasonable investor would expect, the Supreme Court stressed the importance of context, such as 'the customs and practices of the relevant industry' and whether the opinion was expressed in a formal statement such as an S.E.C. filing or instead was a 'baseless, off-the-cuff judgment[ ], of the kind that an individual might communicate in daily life.'" *Abramson v. Newlink Genetics Corp.*, 965 F.3d 165, 175 (2d Cir. 2020) (quoting *Omnicare*, 575 U.S. at 190).

Although Mona alleges in conclusory fashion that Gadot's statement was false, Mona neither pleads nor

argues that Gadot did not actually believe his own statement or provided investors with untrue supporting facts. To the contrary, Mona simply pleads that Microbot shares "were in the middle of a steady decline" – which suggests not only that Gadot's statement was true but that Gadot honestly believed what he was saying. (Counterclaim ¶ 64.) Moreover, Mona neither pleads nor argues that Microbot omitted facts conflicting with how a reasonable investor would have interpreted Gadot's statement. Seeing that Gadot made the "extremely cheap" statement during a "town hall" conference call with investors (and not in a formal SEC filing), and without more substantive allegations from Mona, the Court concludes that Gadot's statement was non-actionable opinion – no more than a "baseless, off-the-cuff judgment[], of the kind that an individual might communicate in daily life." *See Abramson*, 965 F.3d at 175 (quoting *Omnicare*, 575 U.S. at 190).

E. The Statements of the Investor-Relations Consultants Are Not Actionable

Mona last claims that Microbot's IR consultants made "false and misleading statements to Mona personally about Microbot's financial health, and certain imminent business deals." (Counterclaim ¶ 65.) Both parties cite *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011), in support of their arguments. There, the Supreme Court held that, "[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and

how to communicate it." 564 U.S. at 142. Microbot argues that because it "did not authorize or have control over" these alleged misrepresentations – made by employees of Integra Consulting Group LLC –Microbot was not their "maker" for the purpose of § 10(b). (MBOT Mem. at 20.) In opposition, Mona argues that the IR consultants in fact "are agents of Microbot, Microbot had control over the agents, and so the agents' statements are attributable to Microbot." (MTD Opp. at 12.) There thus appears to be a material factual dispute over whether Microbot exercised "ultimate authority" over the IR consultants' statements. Even assuming that Microbot wielded such authority, however, none of the IR consultants' statements are actionable.

Roe's statement that Microbot shares were "lightning in a bottle" was puffery in the purest sense. "Lack[ing] the sort of definite positive projections that might later require correction," this statement was "too general to cause a reasonable investor to rely upon [it] and thus cannot have misled a reasonable investor." *In re Vivendi*, 838 F.3d at 245 (internal quotation marks and citations omitted); *see also Abramson*, 965 F.3d at 173 ("Generic, indefinite statements of corporate optimism typically are not actionable."); *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004) ("companies must be permitted to operate with a hopeful outlook").

Roe's statement that "the shares were going to get to $10" is a more specific projection; but "simple economic projections, expressions of optimism, and other puffery are insufficient" to support a claim for securities fraud,

Novak v. Kasaks, 216 F.3d 300, 315 (2d Cir. 2000), unless "they are worded as guarantees or supported by specific facts or if the speaker does not reasonably believe them," *In re NTL, Inc. Securities Litigation*, 347 F. Supp. 2d 15, 34 (S.D.N.Y. 2004) (citing *In re International Business Machines Corp. Securities Litigation*, 163 F.3d 102, 107 (2d Cir. 1998)). Mona does not allege that Roe did not believe his own statement or that he supported it with specific facts that he knew to be false. And, although Roe's projection exudes confidence, it is not worded as a guarantee. *Compare Total Equity Capital, LLC v. Flurry, Inc.*, No. 15-CV-4168, 2016 U.S. Dist. LEXIS 71332, 2016 WL 3093993, at *4 n.3 (S.D.N.Y. June 1, 2016) ("ballpark figures . . . not tied to any time horizon" "could not reasonably be construed as a specific fact or 'guarantee'"), *with In re General Electric Co. Securities Litigation*, 857 F. Supp. 2d 367, 380 (S.D.N.Y. 2012) ("You can count on a great dividend, $1.24 board approved at the board meeting last Friday, $1.24 in 2009, $.31 a share in the first quarter," was worded as guarantee), *and Owens v. Gaffken & Barringer Fund, LLC*, No. 08-CV-8414, 2009 U.S. Dist. LEXIS 90895, 2009 WL 3073338, at *6-7 (S.D.N.Y. Sept. 21, 2009) ("we personally guarantee[ ] the principal and floor minimum return of 8%" was worded as guarantee). Moreover, as "a statement of future economic performance," Roe's projection was a forward-looking statement, 15 U.S.C. § 78u-5(i)(1)(C); and, because Mona does not claim that Roe had actual knowledge that his forward-looking statement was false or misleading, that statement is protected by the PSLRA's safe harbor, *see Slayton*, 604 F.3d at 766; 15 U.S.C. § 78u-5(c).

As for Roe's statement that he had "just purchased an additional 10,000 shares in the company," Mona nowhere pleads that this statement was false.

With respect to Altavilla's statements that Gadot was "out in Minneapolis on business, meeting with two Fortune 500 companies," and that Altavilla expected Microbot "to sign an SCS partnership any day," Mona alleges in conclusory fashion that both statements were false "as no SCS partnership was ever signed, and at the time of the statement there was no reasonable probability to believe that a SCS partnership would be signed within a few days, or even a few weeks." (Counterclaim ¶ 67.) Absent are any specific factual allegations showing that Gadot was out somewhere else with someone else doing something else; nor does Mona's Counterclaim even articulate why Altavilla had little reason to believe that an SCS partnership would be signed. Mona does no more than plead fraud by hindsight, which the Second Circuit has roundly rejected. *See Novak*, 216 F.3d at 309 ("Corporate officials need not be clairvoyant; they are only responsible for revealing those material facts reasonably available to them. . . . Thus, allegations that defendants should have anticipated future events and made certain disclosures earlier than they actually did do not suffice to make out a claim of securities fraud."); *see also Cox v. Blackberry Ltd.*, 660 F. App'x 23, 25 (2d Cir. 2016) ("In short, plaintiffs' theory of scienter . . . is that because the release of [defendants' product] ultimately turned out to be a failure, defendants must have known that it would be a failure and lied about this fact to investors."); *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir.

1994) (A bank filed a document stating it believed its loan loss reserve was adequate; two months later, the bank announced its reserve was inadequate and would require a significant addition. The court found that the plaintiff's pleading "technique [was] sufficient to allege that the defendants were wrong; but misguided optimism is not a cause of action, and does not support an inference of fraud.").

Finally, as Microbot correctly observes, all of Mona's claims relating to the IR consultants' statements must be dismissed because Mona fails to plead reliance. Under the "fraud-on-the-market" theory, Rule 10b-5 plaintiffs may "invoke a rebuttable presumption of reliance on material misrepresentations aired to the general public."[19] *Amgen*, 568 U.S. at 461. When such statements are not so aired, however, a plaintiff bears the burden of establishing reliance, as it "is an essential element of the § 10(b) private cause of action"; it "ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011) (internal quotation marks and citation omitted).

Mona alleges that the IR consultants solicited him over private telephone calls. Mona therefore must demonstrate

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19. "The fraud-on-the-market theory rests on the premise that certain well developed markets are efficient processors of public information. In such markets, the 'market price of shares' will 'reflec[t] all publicly available information.'" *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 461, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)).

that he engaged in transactions based on their specific misrepresentations. Mona does not do so; as a result, his claims are improperly pleaded and must be dismissed on this separate ground.

F. Scienter

As an additional basis for dismissal, Microbot argues that Mona's Counterclaim insufficiently alleges scienter as a general matter. Given the other deficiencies and bases for dismissal identified above, the Court need not and does not address the issue.

CONCLUSION

For the foregoing reasons, I recommend that Microbot's motion for judgment on the pleadings and summary judgment motion be GRANTED; that a judgment of $484,614.30 be entered in Microbot's favor; and that Mona's Counterclaim be dismissed with prejudice with respect to all claims except that the following claims should be dismissed without prejudice to an opportunity to replead: (1) IR Consultant Roe's statements that "the shares were going to get to $10" and that he had just "purchased 10,000 shares in the company"; and (2) IR Consultant Altavilla's statements that Gadot was "out in Minneapolis on business, meeting with two Fortune 500 companies," and that Altavilla expected Microbot "to sign an SCS partnership any day." To sufficiently replead, however, Mona would have to allege, *inter alia*, specific facts indicating that the challenged statements were false or misleading. Microbot's alternative request that the

Court sever Mona's Counterclaim from this action should be denied as moot. To the extent not addressed above, the Court has addressed Mona's arguments and finds them to be without merit.

Procedures for Filing Objections

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of Court, with extra copies delivered to the Chambers of the Honorable George B. Daniels, 500 Pearl Street, New York, New York 10007, and to the Chambers of the undersigned, 500 Pearl Street, New York, New York 10007. **FAILURE TO FILE TIMELY OBJECTIONS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW**.

Respectfully submitted,

/s/ Robert W. Lehrburger
ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: December 18, 2020
New York, New York

APPENDIX F — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1, provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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

> **(b) Profits from purchase and sale of security within six months**
>
> For the purpose of preventing the unfair use of information which may have been obtained

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

swap agreement or a security-based swap involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

Section 28(a) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78bb(a), provides:

(a) Limitation on judgments

(1) In general

No person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in 1 or more actions, a total amount in excess of the actual damages to that person on account of the act complained of. Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations under this chapter.

(2) Rule of construction

Except as provided in subsection (f), the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(3) State bucket shop laws

No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate—

> (A) any put, call, straddle, option, privilege, or other security subject to this chapter (except any security that has a pari-mutuel payout or otherwise is determined by the Commission, acting by rule, regulation, or order, to be appropriately subject to such laws), or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security;

(B) any security-based swap between eligible contract participants; or

(C) any security-based swap effected on a national securities exchange registered pursuant to section 78f(b) of this title.

(4) Other State provisions

No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security-based swap or a security futures product, except that this paragraph may not be construed as limiting any State antifraud law of general applicability. A security-based swap may not be regulated as an insurance contract under any provision of State law.