12-2509-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANDREW E. ROTH, DERIVATIVELY ON BEHALF OF
LEAP WIRELESS INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO.,
LEAP WIRELESS INTERNATIONAL, INC.,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*

INTEREST OF THE COMMISSION

The Securities and Exchange Commission submits this brief as *amicus curiae* in response to the invitation of the Court. The Commission has a strong interest in ensuring that Exchange Act Rule 16b-6, 17 C.F.R. 240.16b-6, which implements Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. 78p, as it relates to derivative transactions by corporate insiders, is properly interpreted and its objectives are carried out. The parties assert conflicting interpretations of Section 16(b), 15 U.S.C. 78p(b), and Rule 16b-6(d), 17 C.F.R. 240.16b-6(d), and the Commission submits this brief setting forth its interpretation.

ISSUE ADDRESSED

Whether, under Section 16(b) and Rule 16b-6(d), which allow recovery of short-swing profits gained from the sale and subsequent expiration within six months of short call options written by a ten percent beneficial owner, the ten percent beneficial owner must be such both at the time the option is written and at the time the option expires.

STATEMENT OF THE CASE

This action was brought by Andrew E. Roth, a Leap Wireless International, Inc. shareholder. Roth brought the action on behalf of Leap under Section 16(b) and Rule 16b-6(d) to recover alleged short-swing profits obtained by The Goldman Sachs Group, Inc. while it was a statutory insider of Leap due to its beneficial ownership of more than ten percent of Leap's equity securities. Roth alleged that when Goldman was a statutory insider, it wrote short call options on Leap shares. Because the call options expired unexercised within six months of writing, Roth argues that the premiums Goldman received for writing them are recoverable under Rule 16b-6(d). The district court dismissed Roth's action because, although Goldman was a beneficial owner of more than ten percent of Leap's stock at the time it wrote the options, it had ceased to be so at the time the options expired. *Roth ex rel. Leap Wireless Int'l, Inc. v. The Goldman Sachs Group, Inc.*, 873

F.Supp.2d 524, 536 (S.D.N.Y. 2012). The Commission agrees with the district court's conclusion that Goldman is not liable under Section 16(b) on the facts alleged in the complaint.

A. Statutory and Regulatory Scheme

Section 16(b) provides for the recovery by the issuer, in an action brought by the issuer or by a security holder of the issuer, of profits realized by a statutory insider (an officer, director, or ten percent beneficial owner) from the sale and purchase, or the purchase and sale, of the securities of the issuer when both the purchase and sale, or the sale and purchase, take place within a six-month period. As related to ten percent beneficial owners,[1] Section 16(b) does not "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 . . . involved."

Section 16(b)'s stated purpose is to "prevent[] the unfair use of information which may have been obtained by [a corporate insider] by reason of his relationship to the issuer." As the Supreme Court has noted, "the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking

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[1] By including "beneficial owners" in Section 16(b), Congress intended to prevent "the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others." S. Rep. No. 73-1455, at 55 (1934). Congress set beneficial ownership of more than ten percent of a company's equity securities as the "large stockholders" threshold. *Id.* at 68; Section 16(a)(1), 15 U.S.C. 78p(a)(1) (applying Section 16 to ten percent beneficial owners).

the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 422 (1972). To prevent profit-taking based on inside information, Section 16(b) "imposes a form of strict liability on 'beneficial owners,' . . . rendering them liable to suits requiring them to disgorge their profits even if they did not trade on inside information or intend to profit on the basis of such information." *Gollust v. Mendell*, 501 U.S. 115, 122 (1991).

Although Section 16(b)'s imposition of "liability without fault" creates a "reluctan[ce] to exceed a literal, 'mechanical' application of the statutory text in determining who may be subject to liability," *Gollust*, 501 U.S. at 122, the Supreme Court nonetheless has instructed that "where alternative constructions of the terms of §16(b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders." *Reliance*, 404 U.S. at 424. Recognizing that "[t]he statutory definitions of 'purchase' and 'sale' are broad and, at least arguably, reach many transactions not ordinarily deemed a sale or purchase," courts, when interpreting those terms in Section 16(b), "have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse." *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 593-95 (1973) (citations and quotation marks omitted).

As part of a comprehensive revision of its Section 16 rules in 1991, the Commission considered whether derivative transactions could give rise to speculative abuse of inside information. The Commission concluded that since the value of a derivative security is tied to the value of the underlying equity security, "holding derivative securities is functionally equivalent to holding the underlying equity securities for purposes of section 16." Ownership Reports and Trading by Officers, Directors and Principal Security Holders, 56 Fed. Reg. 7242, 7248 (Feb. 21, 1991) ("Adopting Release"). This functional equivalence means that "both types of securities can be used to engage in the kind of short-swing profit taking that Congress sought to prevent. . . ." *Id.* The Commission therefore adopted Rule 16b-6 "to effect the purposes of section 16 and to address the proliferation of derivative securities and the popularity of exchange-traded options." *Id.*

To prevent the use of inside information to take short-swing profits in derivative transactions, Rule 16b-6 defines when derivative transactions are deemed sales or purchases for Section 16(b) purposes. The Commission began with the fact that "[j]ust as an insider's opportunity to profit commences when he purchases or sells the issuer's common stock, so too the opportunity to profit commences when the insider engages in transactions in options or other derivative securities that provide an opportunity to obtain or dispose of the stock at a fixed price." 56 Fed. Reg. at 7248. Because the insider's "opportunity to profit" on

inside information arises at the commencement of a derivative transaction, the Commission, in its Adopting Release, determined that the "significant event" for Section 16(b) purposes is "acquisition of the derivative security . . . not the exercise." 56 Fed. Reg. at 7248. Thus, Rule 16b-6(a), 17 C.F.R. 240.16b-6(a), as adopted in 1991, states that, for Section 16(b) purposes, "[t]he establishment of or increase in a call equivalent position or liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security . . . and the establishment of or increase in a put equivalent position or liquidation of or decrease in a call equivalent position shall be deemed a sale of the underlying securities."[2] Because acquiring fixed-price derivative securities is treated as a sale or purchase of the underlying equity security under Section 16, the acquisition can be matched to other sales or purchases of the same underlying equity security, or derivative securities, by the insider, and the insider must disgorge any resulting profit. 56 Fed. Reg. at 7249, 7252-53.

While Rule 16b-6(a) defines acquiring a derivative security position as a purchase or sale for Section 16 purposes, Rule 16b-6(b), 17 C.F.R. 240.16b-6(b), exempts the *exercise* of a derivative security from being a purchase or sale under Section 16. Because exercise of a derivative security "essentially changes the form

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[2] A "call equivalent position" increases in value when the underlying security *increases* in value and includes short put options; a "put equivalent position" increases in value when the underlying security *decreases* in value and includes short call options. Rule 16a-1(b) & (h), 17 C.F.R. 240.16a-1(b) & (h).

of beneficial ownership from indirect to direct" and "represents neither the acquisition nor the disposition of a right affording the opportunity to profit," the Commission determined that it is not a Section 16 sale or purchase. 56 Fed. Reg. at 7249.

The expiration or cancellation of a derivative security, however, represents the reacquisition of a right affording the opportunity to profit in that it returns full beneficial ownership of the underlying security to the writer and, in fact, guarantees the writer a profit in the form of the option premium. Thus, as explained in greater detail below, *infra* at 16, Rule 16b-6(d) separately addresses expiration and requires that "[u]pon cancellation or expiration of an option within six months of the writing of the option, any profit derived from writing the option shall be recoverable under section 16(b)." The profit is the premium collected by the insider for writing the option. *Id.*

B. Facts

Goldman Sachs became a ten percent beneficial owner of Leap on September 30, 2009. *Roth*, 873 F. Supp. 2d at 527. Also on September 30, 2009, while it was a ten percent beneficial owner, Goldman Sachs wrote 32,000 short call options covering 3.2 million shares, exercisable at the fixed price of $39 per share, and sold them for 33 cents per share, receiving premiums totaling $1,056,000. *Id.* On October 2, 2009, Goldman Sachs ceased being a ten percent beneficial owner

after it sold enough Leap shares to bring its ownership stake below ten percent. *Id.* The September 30 call options expired unexercised on January 16, 2010, less than four months after issuance. *Id.* Goldman Sachs was not a ten percent beneficial owner of Leap when the call options expired.

C. Proceedings in the District Court

Goldman moved to dismiss Roth's action, relying primarily on two independent arguments. First, pointing out that Section 16(b) requires a matched sale and purchase, Goldman claimed it was not liable on the ground that, accepting that writing the call options was a "sale" under Section 16(b) and Rule 16b-6(a), there was no matching purchase because, according to *Allaire Corp. v. Okumus*, 433 F.3d 248, 252 (2d Cir. 2006), the expiration of the call options was not a "purchase" under Section 16(b). Second, Goldman argued it was not liable because even if the expiration of the call options was a "purchase," it was not a ten percent beneficial owner at the time of expiration, and Section 16(b) applies only when a ten percent beneficial owner is such at the time of both the sale *and* the purchase.[3]

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[3] Goldman also argued that because it was not a ten percent beneficial owner when the call options expired, Rule 16a-2, 17 C.F.R. 240.16a-2, exempted it from Section 16(a)'s reporting requirement, and that Rule 16a-10, 17 C.F.R. 240.16a-10, in turn, exempted it from Section 16(b). The district court did not address the argument, deciding the case on other grounds. Goldman raises the argument again on appeal. Goldman Br. at 25-27. The Commission does not believe it is

Opposing dismissal, Roth argued that Goldman's lack of ten percent beneficial owner status at expiration was immaterial because the expiration of the options was a "non-event"—neither a purchase nor a sale for Section 16(b) purposes. Roth argued that Rule 16b-6(d) satisfies the statutory requirement that a ten percent beneficial owner be such at the time of both a sale and a purchase because writing the option was itself both a sale and a purchase for Section 16(b) purposes. This was so, according to Roth, because writing the call option presented Goldman with the opportunity to profit from inside information, the concern that Section 16(b) was intended to address.

The district court dismissed Roth's action. The court first noted that "in order for liability to attach, the requirements of [Section 16(b)] must be met—it is not enough for a transaction to fall under the broader category of evils that the statute was meant to curb." *Roth*, 873 F. Supp. 2d at 530. One requirement of the statute is that a ten percent beneficial owner be such at the time of both matchable transactions—either the sale and the purchase, or the purchase and the sale, of the security involved. *Id.*

Turning to the regulations, the court rejected both Goldman Sachs's and Roth's arguments that the expiration of the call options within six months of writing was not a "purchase." The court noted that "[i]f the expiration of an option

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necessary to address the exemption argument, and, consequently, takes no position on its correctness.

could never be considered a 'purchase' or 'sale,' then Rule 16b-6(d) could not impose liability consistently with Section 16(b), which 'requires *both* a purchase and sale within a six-month period' to impose liability." *Id.* at 534. Rule 16b-6(d) was consistent with Section 16(b) "if the events that the regulation governs (the writing and expiration of an option) can be considered a 'purchase' and a 'sale.'" *Id.* at 535. Thus, the court found that writing the call options was the "sale," and "[t]he equivalent of the purchase was the expiration of the options on January 16, 2010." *Id.* at 536. Addressing Roth's argument that the writing of the option was a simultaneous purchase and sale for Rule 16b-6(d) purposes, the court stated that "Section 16(b) 'requires at least *two* transactions within six months: a purchase followed by a sale or a sale followed by a purchase.'" *Id.* at 535 (quoting *Magma Power Co. v. Dow Chem. Co.*, 136 F.3d 316, 325 (2d Cir. 1998)). The court concluded that Roth's single-transaction theory "is simply incompatible with the plain language of the statute." *Id.*

Because it was uncontested that Goldman Sachs was not a ten percent beneficial owner at the time of the "purchase"—the expiration of the call options—the court held that Goldman Sachs could not be liable under Section 16(b) and dismissed the action.

DISCUSSION

I. Under Rule 16b-6(d), the expiration of a call option contract within six months of its writing is treated as a purchase by the writer of the call option contract for Section 16(b) purposes.

The parties do not dispute that Goldman's writing of the short call options was a sale under Rule 16b-6(a) because it established a "put equivalent position" that is "deemed a sale of the underlying securities for purposes of section 16(b) of the Act." *See also* Rule 16a-1(h) (defining "put equivalent position" to include "a short call option position").

On appeal, Goldman argues that the district court correctly held that it was not liable under Section 16(b) and Rule 16b-6(d) because it was not a ten percent beneficial owner when the options expired. Goldman Br. 11-14. As an alternative ground for affirmance, Goldman further argues that the expiration of a call option is not a purchase under Section 16(b) because "the SEC's rationale behind imposing liability on the expiration (rather than cancellation) of an option cannot be reconciled with '[t]he settled rule . . . that an insider's inactivity cannot give rise to Section 16(b) liability.'" Goldman Br. 28 (quoting *Magma Power*, 136 F.3d at 325). According to Goldman, *Magma Power's* conclusion that inactivity by an insider cannot give rise to Section 16(b) liability underpins *Allaire's* statement that "'neither the holder's exercise of the option nor the holder's allowing the option to expire constitutes a transaction by the option's writer.'" *Id.* (quoting *Allaire*, 433

F.3d at 252). In Goldman's view, the expiration of an option is neither a purchase nor a sale by the writer because expiration involves no activity by the writer.

Roth argues that, contrary to the district court's conclusion, the expiration of the call options was not a matching purchase by Goldman for Section 16(b) purposes. Rather, he argues, the writing of the call options was both a sale and a purchase by Goldman because "[u]nder the statute the purchase and sale takes place simultaneously by the terms of the option contract." Roth Br. 11. Roth cites three district court cases pre-dating the Commission's 1991 adoption of Rule 16b-6[4] as authority that "[t]he notion that a transaction can be both a purchase and a sale for 16(b) purposes had been approved by a number of courts where necessary to vindicate the purposes of the statute." *Id.* 18.

Neither Roth's argument that writing an option is a simultaneous purchase and sale nor Goldman's argument that expiration of a short call option is not treated as a purchase by the writer is correct. Rule 16b-6(d) requires the disgorgement of the premium received when expiration occurs within six months of writing "because there is short-swing profit potential in such a case." Ownership Reports and Trading by Officers, Directors and Principal Stockholders, 53 Fed. Reg. 49997, 50008 (Dec. 13, 1988). The short-swing profit potential arises

[4] *Colema Realty Corp. v. Bibow*, 555 F. Supp. 1030, 1039 (D. Conn. 1983), *Reece Corp. v. Walco Nat'l Corp.*, 565 F. Supp. 158 (S.D.N.Y. 1981), and *Matas v. Siess*, 467 F. Supp. 217, 224 (S.D.N.Y. 1979).

from the possibility that an insider might acquire an option position "knowing, by virtue of his inside information, that the option will not be exercised within six months." *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 309 (2d Cir. 1998). In such a case, expiration ends the holder's right to exercise and awards the insider a profit from the inside information. To prevent such profit-taking, the Commission determined that "in the case of an expiration of a short option position, the expiration would be treated as the purchase of the option." 53 Fed. Reg. at 50008. Rule 16b-6(d) treats expiration as a purchase, matched to the earlier sale (the writing), by requiring that "[u]pon . . . expiration of an option within six months of the writing of the option, any profit derived from writing the option shall be recoverable under section 16(b) of the Act." Thus, the district court correctly concluded that Goldman's writing of the call options was a "sale," and that "[t]he equivalent of the purchase was the expiration of the options on January 16, 2010." *Roth*, 873 F. Supp. 2d at 536.

Goldman's argument that the expiration of the options is not a purchase under Section 16(b) because inactivity by an insider cannot give rise to liability rests on a misreading of *Magma Power* and *Allaire*. *Magma Power* concluded that an option holder's decision not to exercise the option was neither a purchase nor a sale *by the option holder*. 136 F.3d at 324. There, the "inactivity" was the option holder's decision not to exercise an option to purchase equity securities. *Id.* As

the court noted, insiders have the opportunity to purchase equity securities every day, and the decision not to purchase cannot rationally form the basis of Section 16(b) liability. *Id.* Goldman is not similarly situated. Goldman was the writer, not the holder. And when it wrote the call options, Goldman set the strike price, the amount of the premium, and the expiration date, and it was that activity that presented Goldman an opportunity to profit from inside information. *Gwozdzinsky*, 156 F.3d at 309; 53 Fed. Reg. at 50008. The expiration of the option within six months resulted from a combination of Goldman's activity and the option holder's inactivity.

Goldman's reliance on *Allaire* is equally misplaced. The *Allaire* plaintiff argued that, because the expiration of a set of call options liquidated the writer's put equivalent position, it was a purchase under Rule 16b-6(a), and that that purchase could be matched to the writing of a second set of call options (written within six months), which was a sale under Rule 16b-6(a) because it established a new put equivalent position. 433 F.3d at 249, 251. The court rejected the plaintiff's argument on the ground that Rule 16b-6(a) does not apply to expirations. *Id.* at 252 (Rule 16b-6(a) applies only to determine whether the "initial transaction between the writer and the holder" is a Section 16(b) purchase or sale). Pointing out that Rule 16b-6(d) explicitly deals with expirations, the court stated that "if the SEC had intended Rule 16b-6(a) to govern expirations, the SEC would presumably

have used the word 'expiration' to do so." *Id.* at 253. The court further noted that Rule 16b-6(d) did not apply. The plaintiff was attempting to match two different sets of options, but the writer of an option is liable under Rule 16b-6(d) only when "*that same option* [expires] within six months." *Id.* *Allaire* is inapposite to this case because it dealt with different facts and it interpreted Rule 16b-6(a), not Rule 16b-6(d).

Roth, like Goldman, misreads *Allaire* to hold that the expiration of a call option is never a purchase for Section 16(b) purposes, Roth Br. 15, but he nonetheless contends that Goldman is liable because a simultaneous sale and purchase took place when Goldman wrote the call options. It therefore is immaterial, in Roth's view, that Goldman was not a ten percent beneficial owner at expiration because it was a ten percent beneficial owner when it wrote the call options. Roth's argument conflicts with the plain language of both Section 16(b) and Rule 16b-6(d).

The imposition of strict liability under Section 16(b) turns on the "objective standard[s]" set out in the statute. *Reliance*, 404 U.S. at 422-23. One objective standard in Section 16(b) is the requirement that the insider engage in "any purchase and sale, or any sale and purchase" of the issuer's equity securities. The requirement of either a purchase and sale, or sale and purchase, means that there must be two events, one offsetting the other. *Magma Power*, 136 F.3d at 324-25;

see also 56 Fed. Reg. at 7248 (Section 16 applies to "insiders who engage[] in two transactions in the company's equity securities within a six-month period of time"). Roth argues that two events exist because Goldman "irrevocably committed to both the purchase and sale of Leap Wireless equity securities on writing the Options—a simultaneous purchase and sale." Roth Br. 4. Roth's simultaneous purchase-and-sale theory presumes that the option holder will not exercise the option, and that the subsequent expiration of the option within six months relates back to the writing such that the writer will be deemed at the time of writing to have made a purchase to match its sale for Section 16(b) purposes.

Roth's presumption ignores an essential feature of an options contract—the holder's right to decide if and when to exercise the option before it expires. Goldman's writing of the call options was a sale under Rule 16b-6(a), but it does not follow that Goldman was immediately and irrevocably committed to a matching purchase. Because the holder of an option can decide whether or not to exercise, "the parties are irrevocably committed only when the optionee exercises." 5A Arnold S. Jacobs, Disclosure & Remedies under the Securities Laws § 4:166, at 4-603 (2012). Recognizing that fact, Rule 16b-6(d) does not treat the writing of the call options as simultaneous sale-and-purchase; rather, Rule 16b-6(d) requires disgorgement of short-swing profits obtained from short options positions only "*[u]pon cancellation or expiration of an option* . . ." (emphasis added). The actual

cancellation or expiration of the option is the triggering event for liability under Rule 16b-6(d), not the writing of the option. Roth's contrary assertion, Roth Br. 11, 17, is simply incorrect. Treating of the actual expiration of an option as the Section 16(b) purchase is consistent with the goal of depriving insider-writers of short options of their profits because it acknowledges that the profit is not locked-in until expiration. Thus, Rule 16b-6(d) allows recovery of the premium paid for the call options only after they expire, and treats the actual expiration as the matching purchase required by Section 16(b).

Roth's argument is not supported by the cases he cites. For example, key to the court's holding in *Matas v. Siess*, 467 F. Supp. 217 (S.D.N.Y. 1979) was the fact that under then-governing precedent, "an option is a purchase only when it is exercised, not when it is granted." *Id.* at 224. But as explained above, *supra* at 6, the Commission's 1991 rulemaking clarified that acquisition of an option is the "significant event," not the exercise. *Colema Realty Corp. v. Bibow*, 555 F. Supp. 1030 (D. Conn. 1983), likewise was decided before the 1991 rulemaking, and likewise relied on precedent holding that "option shares are deemed to have been purchased on the date the option was exercised." *Id.* at 1039. And in any event, *Colema* clearly involved two distinct transactions: the defendants surrendered (sold) 100 shares of previously acquired stock at current market value and, using the value received for those shares, acquired (purchased) new shares at the option

price. *Id.* *Reece Corporation v. Walco National Corporation*, 565 F.Supp. 158 (S.D.N.Y. 1981), addressed when two sales taking place at different times might nonetheless be part of a single transaction, and contributes nothing to the question of when a single transaction might be a simultaneous purchase and sale.

II. Rule 16b-6(d) requires that a ten percent beneficial owner pay the options premium to the issuer only if the ten percent beneficial owner was such both at the time the options contract was written and when it expires.

Section 16(b), as it relates to ten percent beneficial owners, plainly requires that the ten percent beneficial owner be such "both at the time of the purchase and sale, or the sale and purchase, of the security . . . involved." *See Reliance*, 404 U.S. at 422-23. Neither a purchase of securities by which a person becomes a ten percent beneficial owner nor a sale of securities made after a person ceases to be a ten percent beneficial owner is matchable for purposes of liability under Section 16(b). *Reliance*, 404 U.S. at 424-25 (Section 16(b) does not apply to sales made after a person ceases to be a ten percent beneficial owner); *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 249-50 (1976) (Section 16(b) applies only to purchases made after a person becomes a ten percent beneficial owner).

Roth correctly notes that treating expiration as the Section 16(b) purchase means that a ten percent beneficial owner can write options that expire within six months, but nonetheless avoid liability under Rule 16b-6(d) simply by ceasing to be a ten percent beneficial owner before the short options expire. Roth Br. 16-17.

This, however, is an unavoidable consequence of the statutory requirements set by Congress. *Reliance*, 404 U.S. at 423 (the literal language of the statute "clearly contemplates that a statutory insider might sell enough shares to bring his holdings below 10%, and later—but still within six months—sell additional shares free from liability under the statute").

Here, it is undisputed that Goldman was not a ten percent beneficial owner when the call options expired which, as explained above, is the relevant purchase under Rule 16b-6(d) for Section 16(b) purposes. The district court correctly held that Goldman could not be held liable under Section 16(b). *Roth*, 873 F. Supp. 2d at 536.

CONCLUSION

For the foregoing reasons, the district court was correct in holding (1) that Rule 16b-6(d) treats the expiration of call options within six months of writing as a purchase for Section 16(b) purposes and (2) that Goldman could not be liable because it was no longer a ten percent beneficial owner when the call options it wrote expired.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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