UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ANDREW E. ROTH,

Plaintiff,

-v- No. 16 CV 6182 (LTS)(HBP)

SCOPIA CAPITAL MANAGEMENT LP; SCOPIA MANAGEMENT, INC.; SCOPIA CAPITAL GP LLC; MATTHEW SIROVICH; JEREMY MINDICH; SCOPIA WINDMILL FUND LP; SCOPIA PX LLC; SCOPIA PX INTERNATIONAL MASTER FUND LP; SCOPIA LB LLC; SCOPIA PARTNERS LLC; SCOPIA LB INTERNATIONAL MASTER FUND LP; SCOPIA INTERNATIONAL MASTER FUND LP; SCOPIA LONG LLC; SCOPIA LONG INTERNATIONAL MASTER FUND LP; SCOPIA LONG QP LLC; AND SMA,

Defendants,

SPIRIT AEROSYSTEMS HOLDINGS, INC.,

Nominal Defendant.

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MEMORANDUM OPINION AND ORDER

Plaintiff Andrew E. Roth brings this action pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) ("Section 16(b)"), on behalf of nominal defendant Spirit Aerosystems Holdings, Inc. ("Spirit"), seeking disgorgement of so-called "short-swing" profits by Defendants Scopia Capital Management LP; Matthew Sirovich; Jeremy Mindich; Scopia Management, Inc.; Scopia Capital GP LLC; Scopia Windmill Fund LP; Scopia Long LLC; Scopia LB LLC; Scopia PX LLC; Scopia Partners LLC; Scopia Long QP LLC; Scopia International Master Fund LP; Scopia PX International Master Fund LP; Scopia LB

International Master Fund LP; Scopia Long International Master Fund LP; and the "SMA" (collectively, "Defendants"). Defendants now move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted, respectively.

The Court has subject-matter jurisdiction of this action pursuant to 15 U.S.C. § 78aa. The Court has considered thoroughly the parties' submissions. For the reasons that follow, Defendants' motion is denied.

## BACKGROUND

The following recitation of facts is drawn from the Complaint (Docket Entry No. 1, Complaint ("Compl.")), the well-pleaded factual content of which is taken as true for purposes of this motion to dismiss, and, as to issues pertinent to the Rule 12(b)(1) motion, from exhibits submitted by Plaintiff. See Kamen v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986).

Between September 2014 and June 2015, while Defendants were beneficial owners of more than 10% of Spirit's common stock, Defendants purchased and sold Spirit shares, realizing a profit Plaintiff alleges was approximately $10 million. (Compl. ¶¶ 18-19.) On May 13, 2016, after the alleged short-swing transaction had concluded, Plaintiff purchased Spirit stock. (Docket Entry No. 26, Decl. of Joshua S. Broitman, Ex. 1). On the same day, Plaintiff requested that Spirit file suit against Defendants pursuant to Section 16(b) to recover their profits garnered through the short-swing transaction. (Compl. ¶ 24.) Spirit did not initiate such an action. (Id.) More than 60 days after requesting that Spirit sue Defendants for violating Section 16(b), Plaintiff filed this complaint in August 2016, seeking disgorgement. (Compl. p. 7.) See 15 U.S.C. § 78p(b) (establishing request requirement and waiting period before which a security holder may bring suit pursuant to Section 16(b)).

## DISCUSSION

Defendants move to dismiss Plaintiff's complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Specifically, Defendants maintain that Plaintiff cannot demonstrate an injury in fact that is sufficiently traceable to Defendants' conduct to satisfy the case-or-controversy requirement of Article III of the Constitution.

In resolving a Rule 12(b)(1) motion to dismiss an action for lack of standing, the Court adopts the "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 Inv. Gen. P'ship, 696 F.3d 170, 173 (2d Cir. 2010). When it comes to standing, "in essence the question . . . is whether the litigant is entitled to have the court decide the merits of the dispute" by invoking its jurisdiction. Crist v. Commission on Presidential Debates, 262 F.3d 193, 194 (2d Cir. 2001). To demonstrate constitutional standing, a plaintiff must have (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. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

"Section 16(b) of the Securities Exchange Act of 1934 imposes a general rule of strict liability on owners of more than 10% of a corporation's listed stock for any profits realized from the purchase and sale, or sale and purchase, of such stock occurring within a 6-month period. These statutorily defined 'insiders' are liable to the issuer of the stock for their short-swing profits, and are subject to suit 'instituted by the issuer, or by the owner of any security of the issuer in the name and [on] behalf of the issuer.'" Gollust v. Mendell, 501 U.S. 115, 116-17 (1991) (internal modifications omitted).

Section 16(b) embodies a congressional determination "that the 'only method . . . effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great.'" Bulldog Inv., 696 F.3d at 174, quoting Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422 (1972). The statute does not confer enforcement authority on the Securities and Exchange Commission. Rather, Congress authorized "two categories of private persons to sue for relief: (1) 'the issuer' of the security traded in violation of § 16(b); *or* (2) 'the owner of any security of the issuer in the name and in behalf of the issuer,'" subject to a requirement of a prior demand on the issuer. Id.; see 78 U.S.C. § 78p(b). The statute grants "enforcement standing of considerable breadth," looking to parties with a "private-profit motive" to carry out the enforcement function. See Gollust, 501 U.S. at 122, 124-25.

It is undisputed that Plaintiff has statutory standing to bring a suit against Defendants under Section 16(b), as Plaintiff is a Spirit shareholder and Defendants do not dispute that the Complaint adequately states a Section 16(b) claim.[1] (Docket Entry Nos. 20, 25, 27.)

Somewhat ironically, Defendants complain that Plaintiff has *only* a profit motive in bringing this lawsuit – that he did not suffer any injury on account of the short-swing trading because he purchased his shares long after the trading had concluded. Invoking the Supreme Court's recent decision on individual standing in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), Defendants argue that Plaintiff lacks constitutional standing because he cannot demonstrate that

[1] In light of Defendants' concession concerning the sufficiency of the Complaint to state a Section 16(b) claim, their motion is denied to the extent it invokes Federal Rule of Civil Procedure 12(b)(6).

he, as an individual, suffered a concrete and particularized injury by reason of the trading because he was not a shareholder at the time of the trading.

The plaintiff in Spokeo sued an online credit reporting agency under the Fair Credit Reporting Act of 1970 (FCRA), claiming that, as a result of the company's breach of a statutory obligation to "'follow reasonable procedures to assure maximum possible accuracy of' consumer reports," it had disseminated incorrect information about him. Spokeo, 136 S. Ct. at 1544-45. On appeal of a Ninth Circuit decision holding that the Spokeo plaintiff had constitutional standing to bring his claim although he could not point to any injury other than the alleged violation of the statutory obligation, the Supreme Court reviewed the requisites of constitutional standing. Starting with the "fundamental" principle that the judiciary's role is cabined by "the constitutional limitation of federal-court jurisdiction to actual cases or controversies," the Court explained that the "irreducible constitutional minimum . . . of standing consists of three elements," Spokeo, 136 S. Ct. at 1547 (citations and internal quotation marks omitted), as follows:

> The Plaintiff must have (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. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Focusing on the injury in fact component, the Court declared that Congress "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Id. at 1548 (citation and internal quotation marks omitted). Establishment of an injury in fact, the Court held, requires a showing that the "plaintiff . . . suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural of hypothetical.'" Id., citing Lujan, 504 U.S. at 560.

While the Supreme Court agreed with the Ninth Circuit that the plaintiff had shown particularized injury, it remanded the case for further proceedings on the question of whether the plaintiff had pleaded injury that was sufficiently concrete, holding that a bare procedural violation cannot satisfy the injury in fact requirement of Article III, as "a violation of one of the FCRA's procedural requirements may result in no harm." Spokeo, 136 S. Ct. at 1550.

Focusing on Spokeo's discussion of the particularized injury requirement and the Court's instruction that a particularized injury "'must affect the plaintiff in a personal and individual way,'" id. at 1548 (citation omitted), Defendants argue that Spokeo renders constitutionally insufficient the statutory standing conferred by Section 16(b) on security holders who did not hold interests in an issuer at the time of the short-swing trading. Defendants' position gives short shrift to the fact that Spokeo only concerned and addressed the sufficiency of a claim of direct injury brought by an individual; Defendants nonetheless argue that Spokeo diminished the constitutional landscape for claims that are brought by one person in the name *and for the benefit of* another who has been injured. Section 16(b) authorizes claims of this latter variety, and the Second Circuit's pre-Spokeo decision in Bulldog Investors specifically recognizes both the constitutional sufficiency of the issuer's injury to support a Section 16(b) claim and the propriety of a shareholder's assertion of the claim on behalf of the issuer. This binding Second Circuit authority requires rejection of Defendants' attack on Roth's standing to prosecute his Section 16(b) claim on behalf of Spirit.

In Bulldog Investors, a plaintiff brought suit on behalf of an issuer pursuant to Section 16(b) to recover profits realized by the defendants from short-swing trading in the issuer's common shares. Bulldog Inv., 696 F.3d at 172. The defendants appealed to the Second

Circuit from a district court judgment in favor of the plaintiff. Id. On appeal, the defendants argued that:

> The [district court] judgment must be vacated for lack of standing because the plaintiff failed to demonstrate that the proscribed short-swing trading caused [the issuer] actual injury as necessary to satisfy the case-or-controversy requirement of Article III of the Constitution. Specifically, although [the defendant] concede[d] that [Section] 16(b) prohibited it, as the beneficial owner of more than 10% of [the issuer's] common stock, from engaging in any short-swing trading, it submit[ed] that in the absence of further wrongdoing, [the] plaintiff [could not] claim any cognizable injury result[ed] from that trading.

Id. (internal modifications omitted).

The Second Circuit rebuffed the attack on the individual plaintiff's standing to assert the claim, holding that Section 16(b) defined a cognizable injury to the company whose stock had been traded, and that the shareholder had standing to pursue a claim to recover on the corporation's behalf for that injury: "[w]here, as here, a shareholder plaintiff pursues a [Section] 16(b) claim on behalf of an issuer, the claim 'is derivative in the sense that the corporation is the instrument for the effectuation of the statutory policy.'" Id. at 175 (internal modifications omitted) (quoting Magida v. Cont'l Can Co., 231 F.2d 843, 846-47 (2d Cir. 1956)). In a derivative action, the shareholder-plaintiff's Article III standing is derived from the standing of the issuer. Bulldog Inv., 696 F.3d at 179. This is so because a shareholder steps into the shoes of the issuer and brings a suit belonging to the corporation. Phillips v. Tobin, 548 F.2d 408, 411 (2d Cir. 1976). Thus, although the Bulldog Investors Court did not specifically address the further question of whether the plaintiff shareholder in that case had owned stock of the issuer at the time of the short swing transaction, its holding as to the derivative nature of the claim compels the conclusion that security ownership at the time of the underlying short swing trading is not determinative of a shareholder plaintiff's ability to assert a constitutionally sufficient

injury in a Section 16(b) lawsuit brought on behalf of the corporation. See generally Bulldog Inv.

Here, Spirit has suffered an injury in fact that is traceable to Defendants' short-swing transaction. See id. at 180. Plaintiff is bringing this Section 16(b) suit to enforce Spirit's substantive right to recover short-swing profits. As Section 16(b) litigation is derivative in nature, Plaintiff has constitutional standing to the same extent as Spirit, and therefore has demonstrated the necessary injury in fact traceable to Defendants' conduct in satisfaction of Article III's requirements.

The conclusion that Roth, as a current shareholder, has standing to pursue Spirit's claim even though he did not hold stock at the time of the short-swing trading is, furthermore, consistent with the Supreme Court's determination in Gollust v. Mendell that Section 16(b) plaintiffs have a financial interest in the outcome of the action relevant to constitutional standing and that the continuation of such interest throughout the pendency of the action addresses that concern. Gollust, 501 U.S. at 125-26.

In light of this Second Circuit and Supreme Court authority, and Spokeo's failure to address derivative standing, the Court is bound to recognize Roth as a party with constitutional standing to pursue a Section 16(b) action on Spirit's behalf. This Court could reject the Bulldog Investors holding only upon a showing that its "rationale [was] overruled, implicitly or expressly, by the Supreme Court" in Spokeo. Fed. Deposit Ins. Corp. v. First Horizon Asset Sec., Inc., 821 F.3d 372, 375 (2d Cir. 2016). Defendants have not made that showing. Finally, while Defendants correctly note that Federal Rule of Civil Procedure 23.1 imposes a general procedural requirement that the plaintiff in a derivative action have held stock at the time of the injury, the prudential principle reflected in that rule neither overrides Section 16(b)'s specific

statutory grant of standing to the holder of "any security of the issuer," nor does it purport to cabin the permissible scope of standing for constitutional purposes. See Adv. Comm. Note to 1966 Addition of Fed. R. Civ. P. 23.1 (framing provision as exercise of court's "inherent power to provide for the conduct of proceedings in a derivative action").

## CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Complaint is denied. The initial pretrial conference in this case shall take place as scheduled on September 7, 2017. The parties are directed to consult the initial conference order (Docket Entry No. 7) in advance of the conference. This Memorandum Opinion and Order resolves Docket Entry No. 19.

SO ORDERED.

Dated: New York, New York
July 28, 2017

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge