

*JK* 5-15-03

MAY 14 2003

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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

Plaintiff,

v.

STILES A. KELLETT, JR., an individual;  
and KELLETT PARTNERS LP, a limited  
partnership, and NAVEEN JAIN and  
ANURADHA JAIN, husband and wife, and  
their marital community, THE JAIN  
FAMILY IRREVOCABLE TRUST, THE  
NAVEEN JAIN GRAT NO. 1 TRUST, and  
THE ANURADHA JAIN GRAT NO. 1  
TRUST,

Defendants,

and

INFOSPACE, INC.,

Nominal Defendant.

No. C01-1528P

ORDER ON CROSS-MOTIONS  
FOR SUMMARY JUDGMENT



CV 01-01528 #00000138

This matter comes before the Court on cross-motions for summary judgment (Dkt. Nos. 68, 82.) Plaintiff alleges that the Jain Defendants engaged in prohibited short-swing trades of InfoSpace stock by transferring shares from the Defendant trusts to personal and escrow accounts. Because these transfers are purchases for purposes of determining short-swing trades, Plaintiff's motion for summary judgment is GRANTED and Defendants' motion for summary judgment is DENIED

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1 BACKGROUND

2 This is a suit by a shareholder of InfoSpace, Mr. Dreiling, against numerous insider  
3 Defendants, alleging that the insiders engaged in unlawful short swing trading – the purchase  
4 and sale (or vice versa) of stock within a six month period. There are two groups of  
5 Defendants in this matter: the Jain Defendants and the Kellett Defendants. The Kellett  
6 Defendants have settled the claims against them. (Dkt. No 133.) Currently before the Court  
7 are cross-motions for summary judgment on Plaintiff’s claims against the Jain Defendants.  
8 The Jain Defendants are the Naveen Jain, a founder and former CEO of InfoSpace, Anuradha  
9 Jain, and three trusts established by the Jains for the benefit of their children.

10 This litigation arises from stock transfers from three trusts established by the Jains in  
11 mid-1998: the Naveen Jain Grantor Retained Annuity Trust No 1 (“NJGRAT”), the  
12 Anuradha Jain GRAT (“AJGRAT”), and the Jain Family Irrevocable Trust (“Family Trust”).  
13 The Jains established these trusts for tax purposes. Each of the two GRATs were initially  
14 funded with two million shares of InfoSpace stock. The Family Trust purchased one million  
15 shares of InfoSpace stock from the Jains Naveen Jain’s brother, Atul Jain, was named as the  
16 trustee of both GRATs The GRATs are irrevocable, and the Jains receive annual annuities  
17 from the GRATs Under the terms of the GRATs, the trustee is the owner of the trust estate  
18 The remainder of the trust estate of the GRATs is paid out to the Jains’ children after the  
19 Jains’ death. Unlike the GRAT, the Family Trust pays no annuity and the sole beneficiaries  
20 are the Jains’ children.

21 Plaintiff alleges that the Jain Defendants engaged in four purchases that subject them  
22 to liability for short-swing trades. The first purchase allegedly occurred in December 1998,  
23 when Mr Jain took one million InfoSpace shares from a trust and placed this stock in escrow  
24 to satisfy a personal indemnity obligation The second, third, and fourth purchases took  
25 place in May 1999, when the Jains deposited trust shares into their personal trading accounts.

1 Defendants argue that the above transactions were not “purchases,” as they are understood  
2 under securities law.

3 The first alleged purchase in December 1998 occurred when Mr. Jain agreed to place  
4 in escrow one million shares of his InfoSpace stock. As InfoSpace was preparing for its  
5 initial public offering (“IPO”) in late 1998, the Board of Directors learned that Mr. Jain  
6 might have incurred liability on behalf of InfoSpace through option grants and disputes  
7 arising out of commercial contracts. InfoSpace hired the law firm PerkinsCoie to investigate,  
8 and the Board later required Mr Jain to personally indemnify the company for potential  
9 claims by placing one million shares of his InfoSpace stock in escrow Mr. Jain executed an  
10 agreement with InfoSpace to establish an escrow, with InfoSpace as the escrow agent.  
11 PerkinsCoie drafted a Securities and Exchange Commission (“SEC”) amendment filed on  
12 behalf of InfoSpace (Spoonemore Decl. Ex. 24.) This filing represented that Mr. Jain had  
13 placed one million shares of common stock held by the NJGRAT trust in escrow, and that  
14 Mr. Jain retained voting control over those shares. (Id. Ex 25 ) Because the NJGRAT trust  
15 is irrevocable, Mr. Jain had no authority to transfer these shares.

16 Over the next year, Mr Jain signed, or authorized his attorney in fact to sign,  
17 numerous SEC filings representing that he had placed the NJGRAT shares in escrow. (Id.  
18 Exs 25-34.) A year later, after no claims were made against InfoSpace for Mr. Jain’s  
19 actions, Mr. Jain requested that the Board release the escrowed shares. In early 2000, the  
20 Board officially released Mr. Jain from the indemnity agreement and the shares from escrow.  
21 Plaintiff alleges that the escrow agreement was an unlawful transfer of shares to Mr. Jain  
22 from the NJGRAT, triggering liability for short swing trades. Defendants contend that no  
23 escrow was ever in fact created. Despite the SEC filings, Mr. Jain states that neither he nor  
24 InfoSpace officially established the escrow. Defendants’ attorneys in this matter,  
25 PerkinsCoie, states that it “is not clear why those [reporting] mistakes [to the SEC] were  
26

1 made.” (Def ’s Resp. at 6 ) Defendants produce statements from numerous other witnesses  
2 testifying to their lack of knowledge of an escrow account.

3           The other alleged purchases in May 1999 occurred when the Jains deposited shares of  
4 the trusts into their personal brokerage accounts. In May 1999, InfoSpace stock split two-  
5 for-one. InfoSpace then issued new stock certificates representing the new shares and sent  
6 these certificates to its shareholders. The NJGRAT and AJGRAT split share certificates  
7 were sent to InfoSpace’s office, while the Family Trust split share certificate was sent to the  
8 Jains’ home. These stock certificates were marked on their face as belonging to the trusts.  
9 Although the trust accounts were held by Banc of America Securities, the Jains sent the  
10 shares to their personal broker at Hambrecht & Quist (“H&Q”).<sup>1</sup> H&Q deposited the Family  
11 Trust shares in the Jains’ personal account. H&Q then sent the Jains a draft letter of  
12 authorization that would “gift” the GRAT split shares to the Jains. After the Jains filled out  
13 these forms and returned them to H&Q, the shares were deposited into the personal trading  
14 accounts of the Jains. The Jains held and controlled these shares, for example by voting on  
15 them, until 2000, when it is alleged this “transfer error” was discovered. The Family Trust  
16 shares were reconveyed to the trust in May 2000. An InfoSpace paralegal who was  
17 responsible for tracking shares noticed a discrepancy in the Jains’ account. (Haberly Dep. at  
18 14-15.) However, Mr. Jain states that he initiated the request that InfoSpace undertake an  
19 internal investigation to determine what stock was held in each account, thereby identifying  
20 the transfer error. As a result of the investigation, the split shares were transferred back to  
21 the GRATs in December 2000.

22           The Jains claim that the transfers were innocent mistaken deposits. Mr. Jain states  
23 that he mistakenly believed that the Jain Trusts maintained accounts at H&Q. The Jains  
24 declare that they did not know that signing the letters of authorization would effect a gift of

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26           <sup>1</sup>       The record is confused regarding whether Nationsbanc or Banc of America was  
                  the holder at the time

1 shares from the GRATs to their personal trading accounts. Because they did not read their  
2 brokerage statements, the Jains claim they were not aware of the transfers.

### 3 ANALYSIS

4 The parties stipulated to presenting the issues in this case before the Court on cross-  
5 motions for summary judgment. (Dkt No. 50.) Summary judgment is not warranted if a  
6 material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir.  
7 1995), cert denied, 516 U.S. 1171 (1996) The underlying facts are viewed in the light most  
8 favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio  
9 Corp., 475 U.S. 574, 587 (1986) “Summary judgment will not lie if . . . the evidence is such  
10 that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty  
11 Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the  
12 burden to show initially the absence of a genuine issue concerning any material fact.  
13 Adickes v. S. H. Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party  
14 has met its initial burden, the burden shifts to the nonmoving party to establish the existence  
15 of an element essential to that party’s case, and on which that party will bear the burden of  
16 proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this  
17 burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence  
18 showing that there is a genuine issue for trial. Id. at 324.

19 Section 16(b) of the 1934 Securities and Exchange Act contains a blanket prohibition  
20 on insiders engaging in short-swing trades – purchasing and selling (or vice versa) within a  
21 six-month window. 15 U.S.C. § 78p(b). This is a bright-line rule designed to combat the  
22 possibility of unfair insider trading. An insider may be a corporate officer, director or 10%  
23 shareholder. Id. at (a)(1). If any corporate insider engages in short-swing trades, a  
24 shareholder may bring suit on behalf of the company, forcing the insider to disgorge all  
25 profits to the company. Id. at (b). The principal issue raised in the cross-motions for  
26 summary judgment is the legal question of whether the trust transactions are purchases under

1 federal securities law Defendants make three basic arguments: (1) because the transfers  
2 from trusts to personal or escrow accounts did not constitute a change of beneficial  
3 ownership of the InfoSpace shares, none of the four disputed transactions was a purchase; (2)  
4 while the transfers from the trust to personal and escrow accounts may be mistakes or gifts,  
5 they are not purchases; (3) since no escrow was ever in fact established, Mr. Jain never  
6 purchased the InfoSpace that were to be placed in escrow

7 It should be noted that Defendants' protests of innocent intentions are largely  
8 irrelevant since Section 16(b) imposes strict liability for short-swing trades. The statute  
9 requires disgorgement to the company of any profit derived from the matching of any  
10 purchase and any sale of an "equity security" within a six-month period by a statutory insider,  
11 irrespective of intent. Gwozdzinsky v. Zell/Chilmark Fund, L.P., 156 F.3d 305, 308 (2d Cir.  
12 1998). "No showing of actual misuse of inside information or of unlawful intent is necessary  
13 to compel disgorgement." Magma Power Co. v. Dow Chem. Co., 136 F.3d 316, 320 (2d Cir  
14 1998). Rather, Section 16(b) "operates mechanically, and makes no moral distinctions,  
15 penalizing technical violators of pure heart, and bypassing corrupt insiders who skirt the  
16 letter of the prohibition." Id. at 320-21. The statute, therefore, "imposes liability without  
17 fault . . . within its narrowly drawn limits " Id. at 321.

#### 18 I Change in Beneficial Ownership

19 Section 16 liability for short-swing trades does not attach if the owner of a stock  
20 merely changes his or her form of ownership Such a transaction is not a purchase, but a  
21 mere change in beneficial ownership. Changes in beneficial ownership are exempted from  
22 Section 16(b) liability 17 C.F.R. § 240.16a-13. Defendants argue that all four transfers  
23 from the trusts to personal and escrow accounts were mere changes in the form of beneficial  
24 ownership. Plaintiff argues that the Jain Defendants did not have beneficial ownership of the  
25 stock in any of the trusts.

1 The general definition of “beneficial owner” is broad, and Defendants urge the Court  
2 to interpret the definition to include persons such as the Jains who receive annuities from a  
3 trust:

4 [T]he term beneficial owner shall mean any person who, directly or indirectly,  
5 through any contract, arrangement, understanding, relationship or otherwise,  
6 has or shares a direct or indirect pecuniary interest in the equity securities,  
7 subject to the following

8 (i) The term pecuniary interest in any class of equity securities shall mean the  
9 opportunity, directly or indirectly, to profit or share in any profit derived from a  
10 transaction in the subject securities.

11 Rule 16a-1(a)(2) However, the regulations refer to another section to determine how to  
12 analyze beneficial ownership in the specific context of trusts.

13 (ii) The term indirect pecuniary interest in any class of equity securities shall  
14 include, but not be limited to:

15 ..

16 (E) A person’s interest in securities held by a trust, as specified in §  
17 240.16a-8(b).

18 Rule 16a-1(a)(2) (emphasis added) Rule 16a-8 spells out how to analyze trust ownership.

19 The “settlor” or founder of the trust is considered the beneficial owner “where they  
20 have the power to revoke the trust without the consent of another person.” Rule 16a-  
21 8(a)(2)(ii). There is no dispute that the Jains did not have the power to revoke the trusts,  
22 therefore the fact that they are settlors does not make them beneficial owners.

23 The beneficiary of the trust is considered a beneficial owner in a number of  
24 circumstances:

25 (3) Beneficiaries. A beneficiary subject to section 16 of the Act shall have or  
26 share reporting obligations with respect to transactions in the issuer's securities  
held by the trust, if the beneficiary is a beneficial owner of the securities  
pursuant to § 240.16a-1(a)(2), as follows:

(i) If a beneficiary shares investment control with the trustee with respect to a  
trust transaction, the transaction shall be attributed to and reported by both the  
beneficiary and the trust;

1 (ii) If a beneficiary has investment control with respect to a trust transaction  
2 without consultation with the trustee, the transaction shall be attributed to and  
reported by the beneficiary only; .

3 Rule 16a-8(b) (emphasis added) The Jains do not fall under either of the above categories.  
4 Although the Jains received annuity payments, they did not control the trust or share  
5 investment control with the trustee. Therefore, the Jains were not beneficial owners of the  
6 trust.

7 Treatises and case law agree that the above analysis directs the determination of  
8 beneficial ownership of trusts for purposes of Section 16 liability See Feder v Frost, 220  
9 F.3d 29 (2d Cir. 2000); Bloomenthal & Wolff, 3D Securities and Federal Corporate Law §  
10 21.26 at 21-40 (2d ed 2002) (“Beneficiaries of a trust generally will not have the requisite  
11 voting or investment control to be beneficial owners for the purpose of determining insider  
12 status.”), Loss & Seligman, V Securities Regulation at 2425 n. 169 (3d ed. 2001) For  
13 example, a beneficiary has been held liable under Section 16 when he “purchased” shares  
14 with an IOU from a trust of which he was a beneficiary. Morales v. Quintiles Transnational  
15 Corp., 25 F. Supp. 2d 369 (S.D.N.Y. 1998). A transfer of InfoSpace shares from the trust to  
16 the Jains’ personal accounts is a change in beneficial ownership

17 The public policy underlying the reporting and beneficiary ownership rules on trusts  
18 further bolsters Plaintiff’s position. If the Jains did not control investment decisions of the  
19 trust, or even have reason to know of the transactions the trustee made, then it would be  
20 unfair to count such transactions as purchases or sales of the Jains. On the other hand, if the  
21 Jains maintained control over the investment decisions of the trusts and benefitted from those  
22 transactions, then the trusts’ purchases and sales should be counted as the Jains. Loss &  
23 Seligman, V Securities Regulation at 2425-26 (“Where investment control is shared,  
24 including consultation between the trustee and beneficiary, both the trust and the beneficiary  
25 must report the transaction and are responsible for any resulting short-swing profits”) (citing  
26 Sec. Ex. Act. Rel. 28,869 (1991)). Here, because the Jains did not exercise investment

1 control over the trusts, they are not beneficial owners of the shares of the trusts. Normally,  
2 this policy operates to protect non-controlling trust beneficiaries from short-swing liability  
3 for trust transactions. In this case, however, the transactions at issue were not solely within  
4 the corpus of the trusts, but rather a transfer from the trusts to the Jains. Therefore, the Jains’  
5 transfer of shares from the NJGRAT, AJGRAT, and Family Trust to their personal trading  
6 accounts constituted a change in beneficial ownership. Also, transfer of stock from the  
7 NJGRAT trust to an escrow account to satisfy a personal obligation of Mr. Jain effected a  
8 change in beneficial ownership.

9 The above analysis disposes of two additional issues raised by the Defendants.  
10 Because the Jain Defendants admit that they did not report the “misdeposits” from the trusts  
11 to their personal accounts that effected a change in beneficial ownership, the statute of  
12 limitations is tolled Whittaker v. Whittaker, 639 F.2d 516, 528 (9th Cir. 1981), cert denied,  
13 454 U.S. 1031 (1981); (Def.’s Resp. at 13). While the shares owned by one’s spouse or  
14 children may be counted as one’s own for purposes of being an insider, the above rules on  
15 trusts establish that the Jains are not the beneficial owners of the holdings of the trusts.

## 16 II. Stock Transfers from the Trusts as Purchases

17 The term “purchase” is defined in Section 3 of the Securities Exchange Act of 1934,  
18 15 U.S.C. § 78c(a)(13), to include “any contract to buy, purchase, or otherwise acquire.”  
19 Questions often arise as to whether a particular transaction qualifies as a “purchase” or “sale”  
20 within the meaning of the statute. Courts have answered this question by applying essentially  
21 two types of analysis. For transactions which are ordinary (e.g. cash for stock) “purchases”  
22 or “sales,” generally referred to as “orthodox” transactions, Section 16(b) has been strictly  
23 applied, using an “objective” analysis. See Whittaker, 639 F.2d at 522. Therefore, in an  
24 “orthodox” transaction, Plaintiff need not show any possibility for speculative abuse – it is  
25 presumed. For transactions which are not ordinary “purchases” or “sales,” generally termed  
26 “unorthodox” or “borderline” transactions, courts have developed a “pragmatic” or

1 “subjective” analysis to test whether the transaction is of the type that Congress sought to  
2 prohibit. Id. Plaintiff argues that all four stock transfers from the trusts to personal or  
3 escrow accounts are “purchases” under both the orthodox and unorthodox analysis.  
4 Defendants contend that the 1999 stock transfers from the trusts to the Jains’ personal  
5 accounts were not purchases because there was no possibility of speculative abuse. Even if  
6 an escrow was created, Defendants contend that transfer of shares from the NJGRAT trust to  
7 the escrow also created no possibility of speculative abuse, and therefore is not a purchase.

#### 8 A. Choosing the Analysis

9 There is no clear rule that the Court may apply in this case to determine whether to  
10 apply the orthodox or unorthodox test. See Prager v. Sylvestri, 449 F. Supp. 425, 430 n.6  
11 (S.D.N.Y. 1978) (“The distinction between borderline or unorthodox transactions and  
12 garden-variety [or orthodox] ones is not overly bright.”). It is clear to the Court, however,  
13 that the alleged purchases here are distinct from the archetypical case of stock-for-cash trades  
14 and appropriately categorized as borderline.

15 First, there was no obvious “purchase” in the sense of an exchange of stock for  
16 consideration. This lack of consideration may or may not be fatal to the argument that there  
17 was a purchase. As one commentator has noted,

18 [C]ertain transactions involving no consideration are not a purchase or a sale  
19 under Section 16(b): Gifts, stock splits, stock dividends, and receipt of rights  
20 distributed to all stockholders pursuant to preemptive rights. Notwithstanding  
21 these Section 16(b) cases, transferring a security without receiving  
22 consideration could be a Section 16(b) purchase and sale under the proper  
23 circumstances. Whether or not a transfer for no consideration is a purchase and  
24 a sale, transfers for worthless consideration or inadequate consideration can be  
25 Section 16(b) purchases and sales.

26 Jacobs, Disclosure & Remedies Under the Securities Laws § 4:157 (2002). The fact that a  
transfer with no consideration may or may not be a violation of Section 16(b) raises the  
considerations of the “unorthodox” analysis. Also, the Ninth Circuit has treated an  
“overissue” of stock – stock transferred in error – under the unorthodox analysis. Kay v.

1 ScienTex Corp., 719 F.2d 1009, 1011-12 (9th Cir 1983). This is the closest case that the  
2 parties cite to the transaction at issue here, and the Court considers an erroneous overissue to  
3 be similar to the alleged erroneous transfers. Because not every allegedly erroneous transfer  
4 could be considered to be an orthodox transaction, it is appropriate to analyze the  
5 transactions at issue in this matter under the unorthodox rule

6 B. Unorthodox analysis

7 The Supreme Court has taught that the focus of the unorthodox test should be whether  
8 the transaction at issue threatens speculative abuse

9 Where alternative constructions of the terms of Section 16(b) are possible,  
10 those terms are to be given the construction that best serves the congressional  
11 purpose of curbing short-swing speculation by corporate insiders. Thus, in  
12 interpreting the terms ‘purchase’ and ‘sale,’ courts have properly asked  
13 whether the particular type of transaction involved is one that gives rise to  
14 speculative abuse

15 Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 593 (1973). In  
16 considering whether the type of transaction at issue gives rise to the potential for speculative  
17 abuse, two factors are of primary importance: (1) access to inside information; and (2) the  
18 ability to influence the timing of a transaction. Morales v. Gould Investors Trust, 445 F.  
19 Supp. 1144, 1153 (S.D.N.Y. 1977), aff’d, 578 F.2d 1369 (2d Cir. 1978).

20 Applying Kern, the Ninth Circuit has also emphasized that “involuntariness” is an  
21 important factor in determining whether or not a transaction constitutes a “sale” or  
22 “purchase” under Section 16(b). Colan v. Mesa Petroleum Co., 951 F.2d 1512, 1522 (9th  
23 Cir. 1991). The Supreme Court in Kern noted not just the lack of a possibility of speculative  
24 abuse, but also that the defendant – a company undergoing a merger – had no control over  
25 the stock transactions. The Ninth Circuit has effectively made involuntariness into a second  
26 requirement for passing the unorthodox test. “Absent a showing of involuntariness, we  
would not be justified in applying the Kern County rule.” Id. The Ninth Circuit in Kay  
recited very strong language on voluntariness.

1 In determining whether the overissuance of shares is a purchase within the  
2 meaning of section 16(b) we find it appropriate to inquire into the voluntary  
3 nature of the transaction. If an overissuance of stock is done entirely without  
4 participation by the recipient of the stock it is doubtful the transaction presents  
the opportunity for speculative abuse condemned by section 16(b). If,  
however, the recipient is instrumental in the overissuance, the opportunity for  
speculative abuse is present.

5 719 F.2d 1009, 1013 (emphasis added). Other courts have also applied extremely narrow  
6 definitions of voluntariness: “Case law establishes a stiff test of voluntariness. So long as the  
7 seller retains any degree of control over a transaction, its actions will not be found to be  
8 involuntary.” Sprague Elec. Co v Mostek Corp., 488 F. Supp. 842, 845 (N.D. Tex. 1980)  
9 (emphasis added). Accordingly, the Court evaluates whether the Jains’ transactions were  
10 neither voluntary nor likely to lead to speculative abuse.

#### 11 1. Voluntariness

12 The Jain Defendants’ actions were voluntary. The Jains signed papers allowing  
13 transfer of funds from the GRATs. The Jains caused deposits of trust stock into their  
14 personal brokerage accounts by forwarding stock certificates to their personal broker Mr  
15 Jain promised to place shares of the NJGRAT trust into escrow to fulfill a personal  
16 obligation. The fact that the Jains failed to read their brokerage statements, simply signed  
17 legal documents without knowing what they were, and mistakenly sent certificates to their  
18 personal broker does not make their actions involuntary. As noted above, their subjective  
19 intention is not relevant to a Rule 16(b) analysis. The Jain Defendants are correct that their  
20 actions are “less voluntary” than those in the Kay overissue case. See 719 F.2d at 1013.  
21 Nonetheless, the Jains participated in the transfers and retained more than a degree of control  
22 over the transactions. Without the participation of the Jains, the transfers would not have  
23 happened. While the Jains’ actions in effecting the transfers may not have been culpable,  
24 they were voluntary.

1            2. Possibility of Speculative Abuse

2            The Jains' transfer of shares to their personal accounts created the possibility of  
3 speculative abuse. The Jains had insider knowledge and influence over the timing of the  
4 transfers. Again, it does not matter what the Jains intended or what speculative actions they  
5 actually took. Rather, it is clear that the transfer of literally millions of shares to a personal  
6 account created the possibility of speculative abuse. The Jains could have sold the shares at a  
7 high price, repurchased the shares at a lower price, and then transferred the shares back to the  
8 trusts. The transfers created the possibility of selling, or "freeing up" for sale, the Jains'  
9 personal shares. The Kay court found as a matter of law that acquisition through an  
10 erroneous overissuance and consequent sale for cash demonstrated the possibility of  
11 speculative abuse: "When insiders participate in voluntary acquisitions of stock coupled with  
12 conventional sales, the possibility of speculative abuse of insider information is present  
13 Neither proof of actual abuse of insider information nor proof of intent to profit on the basis  
14 of such information is necessary under section 16(b)." 719 F.2d at 1013. Plaintiff  
15 demonstrates both voluntariness and the possibility of speculative abuse

16            C. Gifting

17            Defendants argue that the transfers may be characterized as gifts. Bona fide gifts are  
18 exempted from Section 16(b). Rule 16b-5 ("Both the acquisition and the disposition of  
19 equity securities shall be exempt from the operation of Section 16(b) of the [Exchange] Act if  
20 they are bona fide gifts.") Gifts are not sales or purchases when made in good faith and  
21 without subterfuge. See Shaw v. Dreyfus, 172 F.2d 140, 142-43 (2d Cir. 1949), cert. denied,  
22 337 U.S. 907 (1949).

23            There is no evidence that the trusts gifted the shares, or had the authority to gift the  
24 shares, to the Jain Defendants. There is no evidence that the Jain Defendants had the power  
25 or authority to gift the trust shares to themselves. An allegedly erroneous transfer cannot be  
26 reclassified as a gift to escape liability for short-swing trades



1 certificates or where the certificate would be held. The Court does not find it unusual,  
2 however, that the attorneys for InfoSpace, PerkinsCoie, would hold the certificates. See  
3 FDIC v. Knostman, 966 F.2d 1133, 1140 (7th Cir. 1992). Neither does the failure to identify  
4 a third party nor the fact that PerkinsCoie already had possession of the certificates at the  
5 time of the agreement's execution prevent formation of the escrow. See id. at 1140-41. It is  
6 clear that the parties intended and agreed to encumber the personal property and establish an  
7 escrow. Cf. Stoebuck, 17 Wash. Prac., Real Estate: Property Law § 7.11 ("delivery" means  
8 "intent." It is possible, and Washington has so held, for a deed to be delivered though it  
9 remains in the grantor's possession, provided his intent that it shall pass title is clearly  
10 shown.") The terms of the escrow are not in dispute. Mr. Jain and InfoSpace, with the  
11 assistance of PerkinsCoie, represented to the SEC that the NJGRAT shares were placed into  
12 escrow. It is undisputed that PerkinsCoie held the certificates when Mr. Jain and InfoSpace  
13 signed the agreement. These actions formed an escrow.

14 Additionally, the Court agrees with Plaintiff that Mr. Jain's pledge of NJGRAT shares  
15 created the possibility of speculative abuse. Through the pledge of the NJGRAT shares, Mr.  
16 Jain avoided pledging stock he already owned, thereby gaining an opportunity to trade a  
17 million shares that otherwise would have been encumbered. Mr. Jain incurred no risk that  
18 the one million shares from the NJGRAT would decrease in value, since he did not pay for  
19 the shares on their transfer. Because Mr. Jain placed in escrow one million shares of the  
20 NJGRAT, he effected a purchase for purposes of liability under Section 16(b).

#### 21 IV Motion to Strike Expert Report

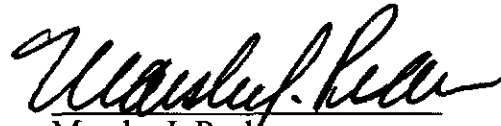
22 Plaintiff moves to strike Defendant's expert report. Defendant's expert report on  
23 securities law does not assist the Court in resolving the cross-motions. Accordingly,  
24 Plaintiff's motion to strike is DENIED as MOOT.

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CONCLUSION

Because the transfers at issue in this matter are purchases for purposes of determining short-swing trades, Plaintiff's motion for summary judgment is GRANTED and Defendants' motion for summary judgment is DENIED.

Dated. May 14, 2003.



Marsha J. Pechman  
United States District Judge