

06-3771-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANDREW E. ROTH derivatively on behalf of
BEACON POWER CORPORATION,
Plaintiff - Appellant,

v.

PERSEUS, L.L.C., PERSEUS CAPITAL, L.L.C., PERSEUS 2000
EXPANSION, L.L.C., PERSEUS INVESTMENT GROUP, INC.,
FRANK H. PEARL, JOHN DOES NOS 1-20 and BEACON POWER
CORPORATION,
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*,
IN SUPPORT OF THE POSITION OF THE APPELLEES

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission submits this brief as *amicus curiae* to address important legal issues relating to the “short-swing” trading provision in Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b). The objective of Section 16(b) is to deter certain corporate insiders - - officers, directors, and holders of more than ten percent of any class of an issuer’s equity securities (“ten

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CERTIFICATE OF SERVICE

I, Allan A. Capute, am a member of the bars of Maryland and the District of Columbia, and I hereby certify that on 16th day of January, 2007, I caused to be served two copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF THE POSITION OF THE APPELLEES on counsel for the parties of record at the addresses below, by Federal Express.

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(C)

I hereby certify that, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), the attached BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF THE POSITION OF THE APPELLEES is proportionally spaced, has a typeface of 14 points, and contains approximately 7860 words. Because the brief exceeds the word limit of the Rule 32(a)(7)(C), the Commission has filed with its brief the MOTION OF THE SECURITIES AND EXCHANGE COMMISSION TO EXCEED THE WORD LIMITATION.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1):
BRIEFS IN DIGITAL FORMAT

I certify that THE BRIEF OF THE SECURITIES AND EXCHANGE
COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF THE POSITION OF THE
APPELLEES, as submitted in digital format, has been scanned for viruses as required
by Local Rule 32(a)(1) and that no viruses have been detected using McAfee
Enterprise VirusScan version 8.0i.

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STATUTORY ADDENDUM

Section 16(b) of the Securities Exchange Act of 1934,
15 U.S.C. 78p(b)

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 (as defined in section 206B of the Gramm-Leach-Bliley Act) 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 (as defined in section 206B of the Gramm-Leach-Bliley Act) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

Rule 16b-3(d) of the Securities Exchange Act of 1934,
17 C.F.R. 240.16b-3(d)

(d) Grants, awards and other acquisitions from the issuer. Any transaction involving a grant, award or other acquisition from the issuer (other than a Discretionary Transaction) shall be exempt if:

(1) The transaction is approved by the board of directors of the issuer, or a committee of the board of directors that is composed solely of two or more Non-Employee Directors;

(2) The transaction is approved or ratified, in compliance with section 14 of the Act, by either: the affirmative votes of the holders of a majority of the securities of the issuer present, or represented, and entitled to vote at a meeting duly held in accordance with the applicable laws of the state or other jurisdiction in which the issuer is incorporated; or the written consent of the holders of a majority of the securities of the issuer entitled to vote; provided that such ratification occurs no later than the date of the next annual meeting of shareholders; or

(3) The issuer equity securities so acquired are held by the officer or director for a period of six months following the date of such acquisition, provided that this condition shall be satisfied with respect to a derivative security if at least six months elapse from the date of acquisition of the derivative security to the date of disposition of the derivative security (other than upon exercise or conversion) or its underlying equity security.

Notes to § 240.16b-3

Note (1): The exercise or conversion of a derivative security that does not satisfy the conditions of this section is eligible for exemption from section 16(b) of the Act to the extent that the conditions of § 240.16b-6(b) are satisfied.

Note (2): Section 16(a) reporting requirements applicable to transactions exempt pursuant to this section are set forth in § 240.16a-3(f) and (g) and § 240.16a-4.

Note (3): The approval conditions of paragraphs (d)(1), (d)(2) and (e) of this section require the approval of each specific transaction, and are not satisfied by approval of a plan in its entirety except for the approval of a plan pursuant to which the terms and conditions of each transaction are fixed in advance, such as a formula plan. Where the terms of a subsequent transaction (such as the exercise price of an option, or the provision of an exercise or tax withholding right) are provided for in a transaction as initially approved pursuant to paragraphs (d)(1), (d)(2) or (e), such subsequent transaction shall not require further specific approval.

