APPENDIX

APPENDIX A

United States Court of Appeals
for the Second Circuit

Docket No. 17-3218-cv
August Term 2017

Terry KLEIN, derivatively ON BEHALF OF QLIK TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

QLIK TECHNOLOGIES, INC.,
Defendant-Appellant,

v.

Cadian Capital Management, LP, Cadian Fund LP, Cadian Master Fund LP, Cadian Gp, LLC, Cadian Capital Management Gp, LLC, Eric Bannasch,
Defendants-Appellees.

Argued: May 14, 2018
Decided: October 2, 2018

PAUL DENNIS WEXLER (Glenn F. Ostrager, on the brief), New York, N.Y., for Appellants.

JAMES E. TYSSE, Akin Gump Strauss Hauer & Feld LLP (Z.W. Julius Chen, Douglas A. Rappaport, Robert H. Pees, Jessica Oliff Daly, on the brief), Washington, D.C. for Appellees.

Before POOLER, LOHIER, Circuit Judges, and SULLIVAN, District Judge.[1]

JUDGE RAYMOND J. LOHIER, JR. dissents in a separate opinion.

POOLER, Circuit Judge:

Appellant Terry Klein brought this suit derivatively as a shareholder of Qlik Companies. She alleges that Appellees, referred to collectively as the "Cadian Group," owned more than ten percent of Qlik and engaged in "short-swing" transactions in that stock in 2014, in violation of Section 16(b) of the Securities Exchange Act. While the action was stayed for reasons irrelevant to this appeal, Qlik was bought out in an all-cash merger, causing Klein to lose any financial interest in the litigation. After the stay was lifted, the Cadian Group moved to dismiss the action for lack of standing. Klein moved to substitute Qlik under Rule 17(a)(3) of the Federal Rules of Civil Procedure. The District Court for the Southern District of New York (Ramos, *J.*) found that Klein's lack of standing deprived it of jurisdiction to do anything other than dismiss the suit and that, in any case, Qlik could not be substituted under Rule 17 because it had not made an "honest mistake" when it failed to join the action earlier.

We disagree. Klein's personal stake at the outset of the litigation established her standing. When she lost her personal stake as the action proceeded, the only jurisdictional question was whether the case had

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[1] Judge Richard J. Sullivan, United States District Court for the Southern District of New York sitting by designation.

become moot. A district court determining whether a case has become moot maintains jurisdiction to determine whether a substitute plaintiff would avoid that result. Rule 17(a)(3) allows substitution of the real party in interest so long as doing so does not change the substance of the action and does not reflect bad faith from the plaintiffs or unfairness to the defendants. There is no "honest mistake" requirement beyond that. The district court should have substituted Qlik and denied the Cadian Group's motion to dismiss for lack of jurisdiction.

Accordingly, we VACATE the district court's dismissal of the action for lack of subject matter jurisdiction and REMAND for substitution of Qlik and further proceedings consistent with this opinion.

BACKGROUND

Section 16(b) of the Securities Exchange Act requires corporate insiders, including owners of more than ten percent of a company's stock, to disgorge what are colloquially known as "short-swing profits," i.e., any profits made from buying and selling or selling and buying within a six-month period a security based on that company's stock. 15 U.S.C. § 78p(b). The statute imposes strict liability on insiders likely to have access to insider information in order to "tak[e] the profits out of a class of transactions in which the possibility of abuse was believed [by the Congress that passed it] to be intolerably great." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422, 92 S.Ct. 596, 30 L.Ed.2d 575 (1972). Suits under 16(b) can be brought by the company that issues the relevant stock or, "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," by any "owner of any security of the issuer." 15 U.S.C. § 78p(b).

The Cadian Group allegedly owned more than ten percent of Qlik and engaged in short-swing transactions in that stock in 2014. Klein purchased some of Qlik's stock and made demand on Qlik on June 11, 2015. Qlik informed Klein that it did not intend to bring an action, so Klein filed a complaint against the Cadian Group on October 15.

The case was stayed on November 20 pending resolution of a motion in a related case brought by the same plaintiff's attorneys against the same group of defendants who apparently engaged in similar transactions with another company. In the meantime, a private equity company that is not a party to this matter bought out Qlik in an all-cash merger. The agreement was signed on June 2, 2016, and checks were cut to shareholders on August 22.

On November 11, 2016, the Cadian Group requested permission to file a motion to dismiss on the grounds that Klein no longer had standing after selling her shares in the merger.[2] Four days later, Klein requested permission to file a motion to substitute Qlik (now under new ownership) under Rule 17(a)(3) of the Federal Rules of Civil Procedure. The district court granted the Cadian Group's motion to dismiss and

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[2] The Cadian Group also argued that Klein did not have standing at the inception of the lawsuit, but the district court (correctly) rejected that argument and it is not at issue on appeal. *See Klein ex rel. Qlik Techs., Inc. v. Cadian Capital Mgmt., LP*, 15 Civ. 8140 (ER), 2017 WL 4129639, at *5-6 (S.D.N.Y. Sept. 15, 2017).

denied Klein's motion to substitute. *Klein*, 2017 WL 4129639, at *11. The court reasoned that Klein's lack of continuing financial interest in the litigation caused her to lose standing, which made the case moot. *Id*. at *8. According to this logic, Klein's lack of standing rendered the court powerless to rule on her motion to substitute. The district court found in the alternative that Rule 17(a)(3) does not actually apply to this situation because Klein did not make an "honest mistake" in failing to include Qlik as a plaintiff ab initio. *Id*. at *10 & n.13. Klein and Qlik timely appealed.

DISCUSSION

The district court should not have hesitated to substitute Qlik. It has the constitutional power to substitute a real party in interest to avoid mooting a case and Rule 17(a)(3) is an appropriate procedural mechanism for doing so.

I. The Jurisdictional Consequence of Klein's Loss of a Personal Stake

It is an elementary lemma of constitutional interpretation that Article III, Section 2 limits the power of federal courts to adjudicating "Cases" and "Controversies." In practice this means that the judicial power to articulate the law extends only to complaints from parties "seek[ing] redress for a legal wrong." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). In civil matters, federal courts will only hear from plaintiffs who clearly allege that one or more of a defendant's actions led to an "invasion of [the plaintiffs'] 'legally protected interest' " in a manner that makes it "likely

that the injury will be redressed by a favorable decision." *Bhatia v. Piedrahita*, 756 F.3d 211, 218 (2d Cir. 2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). We may, in short, only entertain complaints from a complainant with a concrete stake—and not just a "keen interest"—in the outcome of the litigation. *Hollingsworth v. Perry*, 570 U.S. 693, 700, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013).

We have previously found that there is a case or controversy in a Section 16(b) case so long as the party bringing suit is either the corporation that issued the securities in question or a current security holder of that corporation. *See Donoghue v. Bulldog Inv'rs Gen. P'ship*, 696 F.3d 170, 175 (2d Cir. 2012). At this stage of the litigation, nobody contests that Klein's interest in Qlik at the initiation of the suit and until the moment of the buyout was sufficient to empower the district court to hear her Section 16(b) action. The question in front of us is what that court has the power to do now that Klein no longer has any financial stake in Qlik.

The district court concluded that, once Klein was bought out, it lost all power to do anything but declare that it no longer had subject-matter jurisdiction. *Klein*, 2017 WL 4129639, at *10. It reasoned that a derivative plaintiff in a Section 16(b) action who loses her stake in the corporation thereby loses her standing to maintain the action, *id*., which rendered "the only function remaining to the court . . . that of announcing

[its lack of jurisdiction] and dismissing the cause."[3] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). According to the court below, "[w]hile it may be true that courts have distinguished between standing and mootness, the Supreme Court in analyzing whether a plaintiff would maintain some continuing financial stake in a Section 16(b) litigation has indicated that the applicable doctrine is that of standing." *Klein*, 2017 WL 4129639, at *7 n.8 (internal quotation marks omitted).

Reviewing this determination de novo, we hold that it was erroneous. *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.à.r.l.* 790 F.3d 411, 417 (2d Cir. 2015)("On appeal from a dismissal under Rule 12(b)(1) [including on mootness grounds], we review the court's factual findings for clear error and its legal conclusions *de novo*."). The district court's interpretation of the relevant precedent is understandable given the sometimes-incautious way the word "standing" has been used, but it is mistaken nevertheless. The consequences of losing a stake in ongoing litigation are determined not by asking whether the party losing its stake in the litigation has lost its standing but by asking whether the action has become moot.

The case-or-controversy limitation on our jurisdiction, and its focus on parties' stakes in the

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[3] Other district courts in this Circuit have analyzed similar cases similarly under the standing rubric. *See, e.g., Clarex Ltd. v. Natixis Sec. Am. LLC*, No. 12 Civ. 0722 (PAE), 2012 WL 4849146, at *3-6 (S.D.N.Y. Oct. 12, 2012).

action, manifests in three distinct legal inquiries: standing, mootness, and ripeness. Only the first two are at issue here. "[S]tanding doctrine evaluates a litigant's personal stake as of the outset of litigation." *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir. 2001) (quoting *Cook v. Colgate*, 992 F.2d 17, 19 (2d Cir. 1993)); *see also Lujan*, 504 U.S. at 569 n.4, 112 S.Ct. 2130; *Gollust v. Mendell*, 501 U.S. 115, 124, 111 S.Ct. 2173, 115 L.Ed.2d 109 (1991) (discussing Section 16(b) statutory standing as "limited only by conditions existing at the time an action is begun"). Mootness doctrine determines what to do "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation" after its initiation.[4] *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013) (internal quotation marks omitted); *see also United States v. Sanchez-Gomez*, —— U.S. ——, 138 S.Ct. 1532, 1537, 200 L.Ed.2d 792 (2018).

For many years, however, the term "standing" was also used to more broadly connote "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Standing*, Black's Law Dictionary (10th ed. 2014). In other words, "standing" was sometimes used to refer to a particular Article III inquiry and

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[4] Ripeness doctrine, measured at the outset, is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" when it is not yet clear if or how a plaintiff has been injured. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (internal quotation marks omitted); *see also Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 121-22 (2d Cir. 2014).

sometimes, more informally, as a synonym for the personal stake in the litigation with which multiple areas of law concerns themselves. The more informal use of "standing" can be found in some of the cases the district court relied on.

Gollust v. Mendell, the leading case on who can sue under Section 16(b), repeatedly refers to the breadth of "standing." *See* 501 U.S. at 123-25, 111 S.Ct. 2173. But the *Gollust* Court did not ask any constitutional questions; indeed, it avoided them. *See id.* at 125-26, 111 S.Ct. 2173 (stating that had Congress drafted Section 16(b) more broadly, it would have raised "serious constitutional doubt," and relying on constitutional avoidance to avoid determining the constitutional question). It was concerned with a matter of statutory interpretation: to whom Section 16(b) provides a private cause of action. The "standing" it was discussing was what used to be called "statutory standing." The Supreme Court has since clarified that "what has been called 'statutory standing' in fact is not a standing issue, but simply a question of whether the particular plaintiff 'has a cause of action under the statute..'" *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). It is precisely "to avoid incorrectly portraying them as jurisdictional requirements" that we now avoid the term "statutory standing" when discussing the sorts of requirements found in Section 16(b) on which the *Gollust* court focused. *See Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 111 (2d Cir. 2018); *see also Am. Psychiatric Ass'n*, 821 F.3d at 359 ("Because the Supreme Court made clear in *Lexmark*

that the 'statutory standing' appellation is 'misleading' and 'a misnomer,' we avoid this appellation going forward."(citation omitted) (quoting *Lexmark*, 572 U.S. at 127-28 & n.4, 134 S.Ct. 1377)). If *Gollust* had been written after the 2014 *Lexmark* decision, it would surely not have used "standing" in describing the object of its analysis.

An infelicitous phrasing in one of this Circuit's cases adds to the confusion. In *Altman*, we reaffirmed the principle that while "standing doctrine evaluates a litigant's personal stake as of the outset of the litigation, the mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit." 245 F.3d at 70 (internal quotation marks omitted). Just before we did so, however, we seemed to conflate the two doctrines, saying "if the plaintiff loses standing at any time during the pendency of the proceedings in the district court or in the appellate courts, the matter becomes moot." *Id.* at 69. This is another instance of "standing" being used to mean something other than the constitutional minimum a party must establish at the onset of a case. It is "standing" not in its constitutional sense, but as a stand-in for "personal stake in the litigation."

These terminological distinctions may seem mere taxonomic fussiness. But the standing and mootness inquiries "differ in respects critical to the proper resolution of" cases like this one. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). "Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted

to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often . . . for years." *Id.* at 191, 120 S.Ct. 693. Thus, "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Id.* at 191-92, 120 S.Ct. 693. It may also prove prejudicial to non-parties who forewent filing a separate suit on the same issues in reliance on the outcome of the suit already brought. And it may enable defendants to game the judicial system by providing some sort of ephemeral relief to named plaintiffs to avoid the risk of more substantial relief being awarded to other real parties in interest.

The difference between mootness and standing has been most evident in class action jurisprudence. Named plaintiffs in class litigation represent not just—or even primarily—themselves, but also those sufficiently similarly situated that Rule 23 enables judicial recognition of their shared interest. Members of a class who are not named plaintiffs (and do not opt out) will be bound by the result of the litigation. It is well established that their interest in the outcome should not be ignored when circumstances deprive the party that represents them of her interest. *See Sanchez-Gomez*, 138 S.Ct. at 1538 ("The certification of a suit as a class action has important consequences for the unnamed members of the class . . . [as] [t]hose class members may be bound by the judgment and are considered parties to the litigation in many important respects." (internal quotation marks omitted)). Accordingly, "[s]ubstitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons" that would deprive them of standing if present at the outset of litigation "is a

common and normally an unexceptionable . . . feature of class action litigation . . . in the federal courts." *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006); *see also Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003) (distinguishing between cases where standing was lacking ab initio, where immediate dismissal is required, and where a mootness issue arises, where "substitution or intervention might [be] possible"); *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) (allowing for such substitution in a prisoner litigation case). *But see Symczyk*, 569 U.S. at 73-74, 133 S.Ct. 1523 (distinguishing collective actions under the Fair Labor Standards Act from Rule 23 class actions for mootness purposes). Moreover, though a class technically does not exist before it has been certified, "where the class is not certified until after the claims of the individual class representatives have become moot, certification may be deemed to reflate back to the filing of the complaint in order to avoid mooting the entire controversy." *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993); *see also Phillips*, 435 F.3d at 787 ("Strictly speaking, if no motion to certify has been filed (perhaps if it has been filed but not acted on), the case is not yet a class action and so a dismissal of the named plaintiffs' claims should end the case . . . [b]ut the courts . . . are not so strict."). The Supreme Court has allowed the United States to step in as a plaintiff when statutorily permitted "despite the disappearance of the original plaintiffs and the absence of any class certification." *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430-31, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976). And substitution of a plaintiff whose individual

claim has not been mooted is not even always necessary after class certification unless there is reason to believe that the class representative will no longer meet the requirements of Rule 23. *See, e.g.*, *Turkmen v. Ashcroft*, 589 F.3d 542, 545-46 (2d Cir. 2009).

The Seventh Circuit has described these situations as "disregard[ing] the jurisdictional void that is created when the named plaintiffs' claims are dismissed." *Phillips*, 435 F.3d at 787. But one might more accurately say that there is no jurisdictional void to disregard. A legal controversy is not like an electrical circuit, such that a court's power switches off as soon as the personal stake of all of the named parties on either side of the controversy drops below the legally adequate threshold. Rather, Rule 17 contemplates that federal courts maintain jurisdiction over an action in which a representative plaintiff has lost her stake long enough to determine whether the concrete adverseness that existed at the outset of the case can be maintained without undue prejudice to defendants. Only if the answer is "no" is there no longer a live case in front of the court. And only then must a court dismiss the matter for want of jurisdiction.

The dissent argues that recent Supreme Court precedent establishes that this "more relaxed rule of mootness" applies "exclusively to class actions." Dissent at 228. With all due respect, this is an over-reading of the relevant precedent. In *Symczyk*, the Supreme Court held only that a plaintiff-employee who brings a proposed collective action under the Fair Labor Standards Act and whose individual claim is

mooted before any of her fellow employees opt into the action may not be replaced with another plaintiff-employee to avoid mooting the action. *See* 569 U.S. at 73-76, 133 S.Ct. 1523. The Court reasoned that, unlike in a Rule 23 class action, a FLSA collective action "does not produce a class with an independent legal status" before other employees opt into the action. *Id.* at 75, 133 S.Ct. 1523. In *Sanchez-Gomez*, the Supreme Court rejected a flexible mootness inquiry in a criminal case that did "not involve *any* formal mechanism for aggregating claims," not even one "comparable to the FLSA collective action." 138 S.Ct. at 1539.

What *Symczyk* and *Sanchez-Gomez* teach is that whether the interests of non-named interested parties are to be considered in determining whether to dismiss a case as moot depends on whether those parties have a "legal status separate from the interest asserted by the named plaintiff." *Id.* at 1538 (quoting *Symczyk*, 569 U.S. at 74, 133 S.Ct. 1523). And whether non-named parties have that status "turn[s] on the particular traits" of the action in front of the court. *Id.* Ours is not the easy question of whether a derivative action is a class action or not but the harder question of whether a derivative action is like a class action in the relevant ways.

We think it is. Like a class action— but unlike a pre-certification FLSA collective action as understood by the Supreme Court—a derivative action involves a representative plaintiff. Under both Rule 23, governing class actions, and Rule 23.1, governing derivative actions, a plaintiff seeking to bring suit must establish that the Federal Rules allow her to

formally represent the interests of others. Fed. R. Civ. P. 23, 23.1. A derivative action, like a class action, is thus "an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parities only.' " S*anchez-Gomez*, 138 S.Ct. at 1538 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). A corporation is "bound by the judgment" of derivative litigation brought on its behalf and is "considered [a] part[y] to the litigation in many important respects." *Id.* Since the dissent does not deny these analogies, we are not persuaded by its assertion that a derivative action is "even further afield" from class actions than FLSA collective actions. Dissent at 229.

We also note that mootness doctrine counsels suspicion in situations in which a defendant deprives a plaintiff of her stake in the litigation. For instance, when a plaintiff seeks an injunction, a defendant who voluntarily ceases the challenged behavior calls into question whether there is any way to redress the injury alleged. A rigid view of mootness would dismiss such an action. But it is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). To prevent a defendant from strategically pausing their wrongdoing, getting a case dismissed as moot, and then beginning it again after the suit ends (potentially resulting in a new suit), federal law places the burden on the *defendant* who has voluntarily ceased her wrongdoing to prove that mootness should

result. Such a defendant has "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693, and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation,"[5] *Granite State Outdoor Advert., Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002) (internal quotation marks omitted). Similarly, a defendant to a class action may not moot a case simply by offering a settlement equivalent to the full potential value of the individual claims of class representatives. *See Campbell-Ewald Co. v. Gomez*, —— U.S. ——, 136 S.Ct. 663, 670-71, 193 L.Ed.2d 571 (2016). But *see Symczyk*, 569 U.S. at 72-73, 133 S.Ct. 1523 (leaving open whether this rule applies to FLSA actions).

There is no evidence of any skullduggery in this case, but the rule we announce today will surely apply to cases where there has been. Dismissing Klein's claim without further inquiry would leave us powerless to address a defendant's attempt to avoid liability by buying out derivative plaintiffs in future cases. And strategic buyouts are not unheard of in the Section 16(b) context. Take *Gollust* itself for instance. Before that case made it to the Supreme Court, it passed through this Circuit. *See Mendell ex rel. Viacom, Inc. v. Gollust*, 909 F.2d 724 (2d Cir. 1990). While "we decline[d]—in keeping with § 16(b)'s objective analysis regarding defendants' intent—to

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[5] Moreover, dismissing a case as moot because a defendant has voluntarily ceased behavior that allegedly violates a plaintiff's rights is a discretionary matter. *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 483 (2d Cir. 2012).

inquire whether the merger was orchestrated for the express purpose of divesting plaintiff of standing," we could not "help but note that the . . . merger proposal occurred after plaintiff's § 16(b) claim was instituted," which made "the danger of such intentional restructuring to defeat the enforcement mechanism incorporated in the statute . . . clearly present." *Id.* at 731. We observed that "a rule that allows insiders to avoid § 16(b) liability by divesting public shareholders of their cause of action through a business reorganization would undercut the function Congress planned to have shareholders play in policing such actions." *Id.* The Supreme Court quoted this observation with approval in announcing its interpretation of Section 16(b). *See Gollust*, 501 U.S. at 120 n.5, 111 S.Ct. 2173. Today we observe, in parallel fashion, that a mootness doctrine that allows those accused of securities fraud to have a suit promptly dismissed by buying out a derivative plaintiff would undercut the purpose of derivative litigation under Rule 23.1 as well as courts' constitutional function of resolving genuine disputes.

Thus, while the district court is correct that Klein lost her personal stake in the litigation, it is incorrect that it has no ability to consider Klein's motion to substitute Qlik.[6] Unlike a federal court presented with

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[6] Both Section 16(b) and Rule 23.1 require a continuing financial interest. Because the nature of the injury for constitutional purposes is in part delimited by the law underlying the claim in question, we need not determine whether a statute or federal rule that enabled Klein to maintain an action despite her loss of a financial interest in Qlik would run into constitutional problems.

a plaintiff who has no standing, a federal court considering whether a case has become moot already has jurisdiction over that case. When a representative plaintiff's ongoing stake in the outcome is at issue, a federal court maintains its jurisdiction at least long enough to determine whether the represented parties maintain an interest and whether a substitution could avoid mootness. So long as a proposed substitution does not "come[ ] long after the claims of the named plaintiff[ ] were dismissed" and does not alter the substance of the action, it should be considered as an alternative to dismissal. *Phillips*, 435 F.3d at 787.

II. Substituting Qlik under Rule 17(a)(3)

Klein's proposed procedural route to substitution is Rule 17(a)(3) of the Federal Rules of Civil Procedure. That Rule prohibits federal courts from dismissing a case "for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. 17(a)(3). "Crucially for statute of limitations purposes, the claim of the [substituted] real party in interest . . . dates back to the filing of the complaint." *Cortlandt*, 790 F.3d at 421. Qlik, the issuer of the securities at issue, is the real party in interest in this derivative litigation. *See Donoghue*, 696 F.3d at 176 & n.5.

The district court ruled that "[e]ven if [it] had standing to entertain [Klein's] motion, the motion would fail," because Rule 17(a) only allows substitution when there has been an "honest mistake in selecting the proper party," and Qlik's conscious decision not to litigate this action is not an "honest

mistake." *Klein*, 2017 WL 4129639, at *10 n.13. This determination was based on an error of law, and thus constituted an abuse of the district court's discretion. *See Cortlandt*, 790 F.3d at 417 ("A district court's decision whether to dismiss pursuant to Rule 17(a) is reviewed for abuse of discretion." (internal quotation marks omitted)).

In this Circuit, "Rule 17(a) substitution of plaintiffs should be liberally allowed when the change is merely formal and in no way alters the original complaint's factual allegations as to the events or the participants." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997). Even if a proposed substitution meets these requirements, it should be denied if it is being proposed "in bad faith or in an effort to deceive or prejudice the defendants." *Id.* at 21. A court may also deny a Rule 17(a) substitution if doing so would otherwise result in "unfairness to defendants." *Id.* In sum, "[a]lthough the district court retains some discretion to dismiss an action where there was no semblance of any reasonable basis for the naming of an incorrect party, there plainly should be no dismissal where substitution of the real party in interest is necessary to avoid injustice." *Id.* at 20 (citation and internal quotation marks omitted).

Klein's proposed substitution of Qlik would alter none of the factual allegations of the complaint. And there is no evidence that either Qlik or Klein are acting or have acted in bad faith. As far as the record shows, both Qlik and Klein honestly expected, based on the information they had at the time of Klein's demand, that Klein would litigate on Qlik's behalf until judgment. Circumstances intervened. A

third-party investor bought Qlik, resulting both in Klein losing her interest in the litigation and Qlik changing its corporate mind about whether to litigate on its own behalf. We do not have even the slightest reason to believe that this transaction was designed with its impact on this litigation in mind. Neither Klein nor Qlik seems to have engaged in any trickery. Both seem merely to have responded to the extra-litigation circumstances as they presented themselves.

Further, we can discern no unfairness to the Cadian Group in allowing substitution. Of course, if substitution were not allowed, they would no longer have to defend this action or to worry about disgorging the profits from their alleged short-swing trades. And this suit has gone on long enough that if Qlik were to bring a new suit on these claims, the Cadian Group would have a statute of limitations defense. No doubt it is unfortunate for them that Rule 17(a)(3) is the only thing keeping them in court. Unfortunate, but not unfair. Ensuring that an otherwise proper suit is not dismissed for want of a proper party when that party is ready and willing to join the fray is the very purpose of Rule 17(a)(3). *See Cortlandt*, 790 F.3d at 420-21. Rule 17's relation-back provision furthers that purpose in situations like this one, where the course of the litigation has traveled beyond the limitations period through no fault of the real party in interest or the party representing them.

We need not determine whether Qlik committed an "honest mistake" when it declined Klein's demand because, contrary to the dissent's suggestion and the district court's holding, a plaintiff's honest mistake is

not a precondition for granting a Rule 17(a)(3) motion. Only in two opinions interpreting Rule 17 do we ever refer to a plaintiff's honesty, and in neither do we declare that establishing an "honest mistake" is necessary. In *Cortlandt*, we mentioned by way of background that Rule 17(a)(3) "codifies the modern 'judicial tendency to be lenient when an honest misstate has been made in selecting the proper plaintiff.' " 790 F.3d at 421 (quoting 6A Charles Alan Wright et al., Federal Practice & Procedure § 1555 (3d ed. 2014)). But when it came time to enumerate 17(a)(3)'s requirements, we relied, as we do today, on *Advanced Magnetics*, calling it the "leading case interpreting the Rule." *See Cortlandt*, 790 F.3d at 422. In *DeKalb County Pension Fund v. Transocean Ltd.*, we mentioned that substitution of the real party in interest should be denied when that party has neither established that "its tardy appearance was understandable or honest, nor pointed to a semblance of any reasonable basis therefor." 817 F.3d 393, 412 (2d Cir. 2016) (internal quotation marks omitted). This statement was dicta,[7] and, in any case, requiring "a semblance of a reasonable basis" for a real party in interest's "tardy appearance" is not the same as requiring that party to establish that she made an

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[7] Contrary to the dissent's suggestion, *DeKalb's* conclusion that the original plaintiff lacked standing and the court thus lacked subject matter jurisdiction ab initio could not be an "alternative holding." *See* Dissent at 230. "[I]n the absence of a plaintiff with standing . . . there [is] . . . no lawsuit pending for the real party in interest to 'ratify, join, or be substituted into' under Rule 17(a)(3) or otherwise." *Cortlandt*, 790 F.3d at 423. Whether the real party in interest made a mistake does not even enter into consideration.

"honest mistake."[8] Thus, both *Cortlandt* and *DeKalb* are entirely consistent with *Advanced Magnetics*, which focused on "bad faith." 106 F.3d at 20-21. Establishing that a real party in interest has made an honest mistake is, at most, one way of making clear that her failure to join the suit at a previous stage of the litigation[9] was not "deliberate or tactical." *Id.* Whether or not it was an "honest mistake" for Qlik not to join this suit at its outset (or at any point prior to the Rule 17 motion), it did not act in bad faith.

Finally, we conclude that substituting Qlik here is "necessary to avoid injustice," *id.* at 20 (internal quotation marks omitted), because a rule disallowing substitution in these circumstances would contravene the purpose of shareholder derivative suits. A company that rejects a demand to sue does so with the knowledge that a shareholder can sue on its behalf. Unlike in the class action context, the filing of a derivative action does not toll the statute of limitations on the substantive cause of action so that a company can intervene if a shareholder loses her interest in the

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[8] The dissent suggests that these two concepts are the same. Dissent at 231. If so, then it seems the main focus of disagreement is the narrow question of whether Qlik had any semblance of a reasonable basis for failing to join the suit earlier. We think Qlik exhibited at least "minimal diligence" in the circumstances of this case (for the reasons articulated above); our dissenting colleague does not.

[9] In asking why a real party in interest did not join the suit earlier, a court need not only focus on the time at which the suit was brought (or at which demand was rejected). Bad faith in failing to join at any prior point in the litigation can call into question the propriety of allowing substitution.

suit (legal or otherwise). *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S.Ct. 2042, 2051-54 (2017) (discussing the equitable tolling rule in the class context and distinguishing it from securities actions governed by the Securities Exchange Act's statutes of repose); *SRM Global Master Fund Ltd. P'ship v. Bear Stearns Co. L.L.C.*, 829 F.3d 173, 176-77 (2d Cir. 2016) (same). Thus, if a company were disallowed from joining a suit under Rule 17(a)(3) merely because it had rejected a shareholder's demand, its ability (and the ability of its other shareholders) to recover assets of which it was illegally deprived would stand or fall with the continuing financial interest of the representative shareholder. Other shareholders would have to maintain separate derivative actions to avoid having their investment depend on the vicissitudes of that litigation, resulting in a "needless multiplicity of actions." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). Companies would reasonably doubt whether relying on a derivative shareholder to protect their interests would be prudent, undermining Rule 23.1 and the policies it furthers.

CONCLUSION

For the foregoing reasons, we VACATE the district court's dismissal of this action and REMAND for substitution of Qlik and further proceedings consistent with this decision.

LOHIER, Circuit Judge, dissenting:

I would affirm Judge Ramos's decision. Klein's action under Section 16(b) of the Securities Exchange Act became moot and the District Court lost jurisdiction the moment she ceased to have any financial stake in Qlik. In the alternative, Judge Ramos was right to dismiss the action under Rule 17(a)(3) when Klein failed to show that the untimeliness of her motion to substitute Qlik as the plaintiff resulted from an "honest mistake." I address each of these independent reasons for affirmance in turn.

1. Mootness

The majority's take on justiciability and mootness is laudable as a matter of policy but wrong as a matter of law. In United States v. Sanchez-Gomez, a decision that issued while this appeal was pending, the Supreme Court reminded us that a "case that becomes moot at any point during the proceedings is no longer a Case or Controversy for purposes of Article III, and is outside the jurisdiction of the federal courts." —— U.S. ——, 138 S.Ct. 1532, 1537, 200 L.Ed.2d 792 (2018) (quotation marks omitted). To avoid dismissal on mootness grounds, the Court explained, "a plaintiff must show a personal stake in the outcome of the action," thereby ensuring that an "actual and concrete dispute[ ]" exists "at all stages of review, not merely at the time the complaint is filed."Id. (quotation marks omitted). The Court recognized that some of its prior decisions involving class actions applied a less rigid mootness rule. See id. at 1537–40. But the Court confined those decisions exclusively to class actions, explaining that reliance on a more relaxed rule of

mootness in other contexts would be "misplaced." Id at 1537. The Court's reaffirmation of Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013), confirms this reading of Sanchez-Gomez. In Genesis Healthcare, the Court declined to extend its more flexible mootness doctrine for class actions to "collective actions" brought under the Fair Labor Standards Act (FLSA), even though a collective action is "a procedural device bearing many features similar to a class action." Sanchez-Gomez, 138 S.Ct. at 1539–40 (citing Genesis Healthcare, 569 U.S. at 73–75, 133 S.Ct. 1523).

With Sanchez-Gomez in mind, let me turn to this appeal. Klein, the only plaintiff in the case, indisputably had a personal stake in the action before Qlik's cash-out merger transaction closed and her shares were purchased. Had Klein received stock in a parent company rather than cash after the merger, she would have preserved her personal stake in this litigation. See Gollust v. Mendell, 501 U.S. 115, 126–28, 111 S.Ct. 2173, 115 L.Ed.2d 109 (1991). But the "intervening circumstance" of Qlik's cash-out merger in this case stripped Klein of any financial position in the company and therefore any stake in the outcome of this suit. See Genesis Healthcare, 569 U.S. at 72, 133 S.Ct. 1523. At that point, "the action [could] no longer proceed," and the District Court, divested of a concrete dispute, was obligated to dismiss it as moot. See id.

Viewing Sanchez-Gomez as a barrier, the majority stretches to label Klein a "representative plaintiff," analogizes her suit under Section 16(b) of the Securities Exchange Act to either class action

litigation or shareholder derivative suits, and insists that, under the looser mootness doctrine applicable to class actions, the District Court "maintain[ed] its jurisdiction at least long enough to determine whether a substitution could avoid mootness." Majority Op. at 225. But if Sanchez-Gomez forecloses an analogy between class actions and FLSA collective actions, then the analogy that the majority attempts to draw between a class action and a Section 16(b) action (where a single shareholder pursues a claim on behalf of a single issuer rather than a collective) is surely even further afield. Nor is the majority's analogy to derivative suits under Rule 23.1 of the Federal Rules of Civil Procedure an apt one. To the contrary, we have explicitly held that "[t]he standing requirements for shareholder derivative suits are not applicable to a § 16(b) plaintiff." Mendell ex rel. Viacom, Inc. v. Gollust, 909 F.2d 724, 728 (2d Cir. 1990) (emphasis added), aff'd on other grounds sub nom. Gollust v. Mendell, 501 U.S. 115, 111 S.Ct. 2173, 115 L.Ed.2d 109 (1991); see also 9 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 384 (5th ed. 2018) ("Rule 23.1 . . . has been held inapplicable to actions under § 16(b) in view of the policy and language of that Section.").

I would therefore affirm the District Court's dismissal of this case for lack of jurisdiction.

2. Rule 17(a)(3)

Even if the District Court retained jurisdiction after the merger, it correctly held, in the alternative, that Klein's motion to substitute Qlik under Rule 17(a)(3) "would fail." Klein v. Cadian Capital Mgmt.,

LP, 15 Civ. 8140 (ER), 2017 WL 4129639, at *10 n.13 (S.D.N.Y. Sept. 15, 2017).

According to the majority, the District Court was wrong to hold that Rule 17(a)(3) permits substitution only if there has been an "honest mistake" in selecting the proper plaintiff and that Qlik's decision to refuse Klein's demand was not an "honest mistake." Majority Op. at 226. But the majority simply ignores our precedent requiring a movant under Rule 17(a)(3) to show that the failure to timely select the proper plaintiff reflected an honest misstate. See United States v. Zedner, 555 F.3d 68, 82 n.3 (2d Cir. 2008) (Pooler, J., dissenting) ("[W]e are bound by the decisions of prior panels until such time as they are overruled by an en banc panel of our Court or by the Supreme Court." (quotation marks omitted)).

In Cortlandt Street Recovery Corp. v.. Hellas Tellecommunications, S.A.R.L., for example, we explained that Rule 17(a)(3) "codifies the modern judicial tendency to be lenient when an honest mistake has been made in selecting the proper plaintiff." 790 F.3d 411, 421 (2d Cir. 2015) (emphasis added) (quotation marks omitted). "We have ordinarily allowed amendments under Rule 17," we stated, "only when a mistake has been made as to the person entitled to bring suit." Id. at 424 (emphasis added) (quotation marks omitted). The majority casts our language in Cortlandt as mere "background." Majority Op. at 227–28. Maybe. However you wish to describe it, that language became binding precedent less than a year later, in DeKalb County Pension Fund v. Transocean Ltd., 817 F.3d 393 (2d Cir. 2016). There we confirmed that Rule 17(a)(3) " 'was added . . . to avoid

forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought' and 'codified the modern judicial tendency to be lenient when an honest mistake has been made in selecting the proper plaintiff.' " Id. at 412 (emphasis in original) (quoting Cortlandt, 790 F.3d at 421). We then applied the "honest mistake" requirement, holding that DeKalb, which had belatedly moved to be appointed lead plaintiff in a class action, had no recourse under Rule 17(a)(3) because it had not "suggested that whatever 'mistake' may have led to its tardy appearance was 'understandable' or 'honest,' nor pointed to a 'semblance of any reasonable basis' therefor." Id. (quoting Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 20 (2d Cir. 1997)). We noted that no injustice arose from applying the requirement because DeKalb could have "through minimal diligence" made a "timely motion to intervene in the action as a named plaintiff." Id. (quotation marks omitted).

The "honest mistake" requirement did not come out of thin air. The Rules Advisory Committee has long described Rule 17(a)(3) as a mechanism to account for "when an honest mistake has been made in choosing the party in whose name the action is to be filed." Fed. R. Civ. P. 17 advisory committee's note to 1966 amendment (emphasis added). The Advisory Committee's Notes on Rule 17(a)(3), which are "a reliable source of insight into the meaning of [the] rule," United States v. Vonn, 535 U.S. 55, 64 n.6, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002), directly contradict the majority's view that a "plaintiff's honest mistake is not a precondition for granting a Rule 17(a)(3) motion,"

Majority Op. at 227. The Notes also comport with our previously expressed view that a "district court retains some discretion to dismiss an action where there was no semblance of any reasonable basis for the naming of an incorrect party." Advanced Magnetics, 106 F.3d at 20.

The majority avoids its duty to follow DeKalb (to say nothing of the Advisory Committee's Notes) in two ways.

First, it characterizes DeKalb's central holding as "dicta." Majority Op. at 227–28. But DeKalb's "honest mistake" requirement is not dictum: We squarely held that DeKalb's Rule 17(a)(3) argument failed in the absence of an "honest," understandable," or "reasonable" basis for not seeking to become the lead plaintiff in the action sooner. 817 F.3d at 412 (quotation marks omitted). We also held, in the alternative, that even if DeKalb had made an honest mistake, its motion could not relate back to another party's timely complaint under the circumstances of that case. Id. at 412–13. This alternative holding did not downgrade our "honest mistake" holding to dictum. To the contrary, our determination that DeKalb's motion failed to satisfy the "honest mistake" requirement is "an entirely appropriate basis for a holding in th[is] later case." Pyett v. Pa. Bldg. Co., 498 F.3d 88, 93 (2d Cir. 2007), rev'd on other grounds sub nom. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009).

Second, the majority reasons that "requiring 'a semblance of a reasonable basis' for a real party in interest's 'tardy appearance' is not the same as requiring that party to establish that she made an

'honest mistake.' " Majority Op. at 227. In my view, there is no logical distinction between the two phrases: A party that has no "semblance of any reasonable basis" for naming the wrong plaintiff necessarily has not made an "honest mistake" in naming the wrong plaintiff, and vice versa.

With DeKalb's holding in mind, on this record Judge Ramos got it right when he concluded that Klein and Qlik failed to demonstrate that they made an "understandable" or "honest" mistake in not earlier seeking to make Qlik the plaintiff (or, put another way, that there was a "semblance of any reasonable basis" for their delay). Recall that Qlik rejected Klein's initial demand to sue the defendants based on their alleged short-swing trading. Then Klein and Qlik waited until months after Qlik's merger was publicly announced and ultimately closed to move to substitute Qlik as the plaintiff. Had they exercised even "minimal diligence," they could have filed "a timely motion." See DeKalb, 817 F.3d at 412 (quotation marks omitted).

The majority worries that a "needless multiplicity of [Section 16(b)] actions" would flow from affirming Judge Ramos's decision to reject the Rule 17(a)(3) motion in this case. Majority Op. at 228 (quotation marks omitted). With respect, that is a policy justification, not a legal one rooted in the Rule. And even if there were evidence to support the majority's worry (there is not), "district courts have ample tools at their disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings." China Agritech, Inc. v. Resh, —— U.S. ——, 138 S.Ct. 1800, 1811, 201 L.Ed.2d 123 (2018).

For these reasons I dissent.

APPENDIX B

2017 WL 4129639

United States District Court, S.D. New York.

Terry KLEIN, derivatively ON BEHALF OF QLIK TECHNOLOGIES, INC.,

Plaintiff,

v.

CADIAN CAPITAL MANAGEMENT, LP; Cadian Fund, LP; Cadian Master Fund, LP; Cadian Gp, LLC; Cadian Capital Management GP, LLC; Eric Bannasch; and Qlik Technologies, Inc.,

Defendants.

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15 Civ. 8140 (ER)

Signed September 14, 2017

Filed 09/15/2017

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OPINION AND ORDER

Edgardo Ramos, U.S.D.J.

*1 Terry Klein ("Klein" or "Plaintiff") 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 Qlik Technologies, Inc. ("Qlik"), seeking disgorgement of so-called "short-swing" profits by defendants Cadian Capital Management, LP("CCM"), and its client funds, related entities, and founder (together, "Cadian").[1] Pending before the Court is Cadian's motion pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss the Complaint for lack of subject matter jurisdiction, Doc. 31, and Plaintiff's cross-motion to allow Qlik to be substituted as a plaintiff under Federal Rules of Civil Procedure 17(a)(3) and 25(c), Doc. 37.[2]

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[1] Specifically, the Cadian defendants are comprised of: CCM; CCM's founder and portfolio manager, Eric Bannasch; CCM's general partner, Cadian Capital Management GP, LLC; certain of CCM's related funds—Cadian Fund LP and Cadian Master Fund LP, and the Cadian Funds' general partner, Cadian GP, LLC. *See* Complaint ("Compl.") (Doc. 1) ¶¶ 3-8.

[2] Qlik, the nominal defendant, joins Klein's cross-motion for its substitution and opposition to Cadian's motion to dismiss. Doc. 38.

For the reasons discussed below, Cadian's motion to dismiss is GRANTED, and Plaintiff's motion to substitute Qlik is DENIED.

I. BACKGROUND[3]

Klein alleges that during the period between May 8, 2014 and December 31, 2014, Cadian engaged in purchase and sale transactions in Qlik stock that resulted in disgorgeable short-swing profits. Compl. ¶ 30.[4] On June 11, 2015, Klein demanded that Qlik sue Cadian based on their alleged short-swing trading. *Id.* ¶ 36. On July 24, 2015, Qlik declined Klein's demand to sue. *Id.* Plaintiff commenced the instant suit on October 15, 2015. At the time of filing, Klein was an owner of Qlik common stock. *Id.* ¶ 1. Plaintiff does not allege that she owned any common stock during the

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[3] The following facts, accepted as true for purposes of the instant motion, are based on the allegations in the Complaint, Plaintiff's opposition to Defendants' motion to dismiss, exhibits attached to the Complaint and opposition, and declarations submitted by the parties. *See J.S. ex rel. N.S. v. Attica Cent. Sch.,* 386 F.3d 107, 110 (2d Cir. 2004) (citing *Shipping Fin. Servs. Corp. v. Drakos,* 140 F.3d 129, 131 (2d Cir. 1998)) (evaluating a Rule 12(b)(1) motion).

[4] For purposes of this motion, at least, Cadian does not dispute that it is a "statutory insider" as that term is defined in Section 16(b) because it was a greater than 10% beneficial owner of Qlik's common stock. *See* 15 U.S.C. § 78p(a)(1) (defining a statutory insider as one "who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to [15 U.S.C. § 78], or who is a director or an officer of the issuer of such security.")

period of the alleged short-swing trading, from May 8, 2014 to December 31, 2014.[5]

*2 After the Complaint was filed, Qlik went through a corporate reorganization which cancelled all of the public shareholders' stock and paid each shareholder cash in return. Specifically, on June 2, 2016, Qlik announced that it was in the process of being acquired by an affiliate of the private equity investment firm Thoma Bravo, LLC ("Thoma Bravo"). *See* Declaration of Robert H. Pees in Support of Motion to Dismiss ("Pees Decl.") (Doc. 33) Ex. B ("June 2016 Form 8-K"). On August 22, 2016, the merger transaction closed. Pees Decl. Ex. C ("August 2016 Form 8-K"). Under the terms of the merger agreement, each share of Qlik common stock was cancelled and converted to the right to receive $30.50 in cash. *Id.* at 3. Qlik is now a wholly owned subsidiary of Qlik Parent, Inc., which is, in turn, controlled by investment funds affiliated with Thoma Bravo. *Id.*

In November 2016[6] — nearly three months after the cashout merger divested Klein of her shares and thirteen months after she filed the lawsuit—nominal defendant Qlik retained Klein's counsel to litigate the

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[5] The Complaint does not indicate the date of her purchase of the stock, but rather that at the time of filing the instant action, she was a stockholder. *See* Compl. ¶ 1.

[6] On November 20, 2015, upon agreement of counsel, this case was stayed pending the Court's decision on Defendants' motion to dismiss the complaint in *Klein v. Cadian Capital Management, L.P. (Infloblox),* 15 Civ. 4478 (ER). Doc. 17. The Court denied that motion on September 30, 2016, thereby lifting the stay.

§ 16(b) claims on its behalf, and now requests that the Court substitute Qlik as Plaintiff. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Cross-Motion for Substitution ("Pl.'s Mem.") (Doc. 39) at 2.

Cadian now moves to dismiss the action under Rule 12(b)(1) for lack of subject matter jurisdiction, arguing that Klein lacked standing at the inception of the lawsuit, and even if she had standing at the inception, she lacks standing now. Memorandum of Law in Support of the Cadian Defendants' Motion Under F.R.C.P. (12)(b)(1) to Dismiss the Complaint for Lack of Standing ("Defs.' Mem.") (Doc. 32) at 1. Klein concedes that she lost her personal stake in the outcome of this litigation and cross-moves to substitute nominal Defendant Qlik as plaintiff. Doc. 37.

II. APPLICABLE LAW

A. Motion to Dismiss Under Rule 12(b)(1)

A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *See* Fed. R. Civ. P. 12(b)(1). A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000). "In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.,* 752 F.3d

239, 243 (2d Cir. 2014). In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may refer to evidence outside the complaint. *Makarova,* 201 F.3d at 113 (citing *Kamen v. American Tel. & Tel. Co.,* 791 F.2d 1006, 1011 (2d Cir. 1986)); *see also Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir. 2000) ("[T]he court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary hearing.").

B. Motion to Substitute or Intervene

Plaintiff seeks to substitute Qlik under two separate Federal Rules of Civil Procedure: Fed. R. Civ. P. 17(a) (3)—Joinder of the Real Party in Interest; and Fed. R. Civ. P. 25(c)—Transfer of Interest.[7]

*3 Rule 17(a)(1) requires that an action "be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). However, Rule 17(a)(3) prohibits a court from dismissing an action for failure to comply with subsection (a)(1) "until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. 17(a) (3); *see also Cortlandt St. Recovery Corp. v. Hellas*

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[7] Plaintiff also argues that under Fed. R. Civ. P. 15(c)(1) the claims of the proposed new plaintiff should be deemed to "relate back" to the date of filing of the initial Complaint. Rule 15(c) governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations. *Krupski v. Costa Crociere S. p. A.,* 560 U.S. 538, 541 (2010).

Telecommunications, 790 F.3d 411, 420 (2d Cir. 2015). "The real party in interest principle embodied in Rule 17 ensures that only a person who possesses the right to enforce a claim and who has a significant interest in the litigation can bring the claim." *Cortlandt St. Recovery Corp.,* 790 F.3d at 420 (internal quotation marks and citations omitted). If a party successfully moves for ratification, joinder, or substitution, "the action proceeds as if it had been originally commenced by the real party in interest." Fed. R. Civ. P. 17(a)(3). Crucially for statute of limitations purposes, the claim of the real party in interest dates back to the filing of the complaint. *Cortlandt St. Recovery Corp.,* 790 F.3d at 421.

Rule 17 was initially adopted to ensure that assignees could bring suit in their own names, contrary to the common-law practice. *See* Fed. R. Civ. P. 17 advisory committee's notes, 1966 Amendment. However, "the modern function of the rule ... is [ ] to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." *Cortlandt St. Recovery Corp.,* 790 F.3d at 421 (alterations in original). The dismissal provision in Rule 17(a)(3) was added later "to avoid forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought." *Id.* (citing 6A Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 1555 (3d ed. 2014)). "That provision codifies the modern judicial tendency to be lenient when an honest mistake has been made in selecting the proper plaintiff." *Id.*

Rule 25(c) addresses the addition of a party pursuant to a transfer of interest that occurs after the filing of the complaint. *See* Fed. R. Civ. P. 25(c). Rule 25(c) provides, in relevant part: "If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c). In other words, the rule serves as a procedural mechanism to bring a successor in interest into court when "it has come to own the property in issue." *Negrón-Almeda v. Santiago,* 579 F.3d 45, 53 (1st Cir. 2009). "The 'primary consideration in deciding a motion pursuant to Rule 25(c) is whether substitution will expedite and simplify the action.' " *Taberna Capital Mgmt., LLC v. Jaggi*, No. 08 Civ. 11355 (DLC), 2010 WL 1424002, at *2 (S.D.N.Y. Apr. 9, 2010) (quoting *Banyai v. Mazur,* No. 00 Civ. 9806 (SHS), 2009 WL 3754198, at *3 (S.D.N.Y. 2009) (collecting cases)). " 'Substitution of a successor in interest . . . under Rule 25(c) is generally within the sound discretion of the trial court.' " *Id.*; *see also State Bank of India v. Chalasani,* 92 F.3d 1300, 1312 (2d Cir. 1996) ("[G]ranting substitution of one party in litigation for another under Rule 25(c) is a discretionary matter for the trial court.").

C. Section 16(b) Generally

Section 16(b) requires, among other things, that a statutory insider surrender to the issuer (that is, the corporation which issued the applicable equity security, also known as the "issuing corporation") "any profit realized by him [or her] 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 . . . , irrespective of any intention on the part of such [statutory insider] in entering into such transaction....” 15 U.S.C. § 78p(b). The statute “imposes a form of strict liability” on statutory insiders rendering them liable “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); *see Gwozdzinsky v. Zell/Chilmark Fund,* 156 F.3d 305, 310 (2d Cir. 1998) (“The statute, as written, establishes strict liability for all transactions that meet its mechanical requirements.”). In enacting the statute, “ ‘Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public. By trading on this information, these persons could reap profits at the expense of less well informed investors.’ ” *Gollust,* 501 U.S. at 121 (quoting *Foremost-McKesson, Inc. v. Provident Sec. Co.,* 423 U.S. 232, 243 (1976)).

*4 In contrast to “most of the federal securities laws, Section 16(b) does not confer enforcement authority on the Securities and Exchange Commission.” *Gollust,* 501 U.S. at 122. Rather, the statute authorizes two categories of private persons to sue for relief: (1) “the issuer” of the security traded in violation of Section 16(b); or (2) “the owner of any security of the issuer in the name and in behalf of the issuer,” but only “if the issuer shall fail or refuse to bring such suit within sixty days after the request or shall fail diligently to prosecute the same thereafter.” 15 U.S.C. § 78p(b). Thus, the statute recruits the issuer and its security holders as “policemen” by providing them “a private-profit motive” to enforce the law’s prohibition on short-swing trading by insiders. *Gollust,* 501 U.S. at 124-25 (quoting Hearings on H.R.

7852 and H.R. 8720 before House Committee on Interstate & Foreign Commerce, 73d Cong., 2d Sess. 136 (1934)).

III. DISCUSSION

Cadian asserts that Klein lacked standing at the inception of the lawsuit, and even if she had standing at the inception, she lacks standing now. Defs' Mem. at 1. Specifically, Cadian claims that the Court was stripped of its jurisdiction on the day of the merger in August 2016 when Klein's shares were cashed out, and therefore it is now jurisdictionally prohibited from substituting Qlik in place of Klein. Memorandum of Law in Opposition to Plaintiff's Cross-Motion for Substitution and in Further Support of the Cadian Defendants' Motion Under F.R.C.P. 12(b)(1) to Dismiss the Complaint for Lack of Standing ("Defs.' Reply") (Doc. 40) at 3-4.

Before the Court may consider Klein's request to substitute Qlik as plaintiff, it must first determine that it has jurisdiction over the case. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter is . . . 'inflexible and without exception.'"); *see also Harrison v. Potter,* 323 F. Supp. 2d 593, 598 (S.D.N.Y. 2004) ("A court should consider a motion under Federal Rule of Civil Procedure 12(b)(1) prior to the merits of a claim because the substantive merits thereafter "become moot and do not need to be determined.") (citing *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n,* 896 F.2d 674, 678 (2d Cir. 1990)).

A. Standing and Mootness

The Constitution limits the jurisdiction of Article III courts to matters that present actual cases or controversies. *See* U.S. Const. Art. III, § 2, cl. 1. "This limitation means that when a plaintiff brings suit in federal court, she must have standing to pursue the asserted claims. It also generally means that if the plaintiff loses standing at any time during the pendency of the proceedings in the district court or in the appellate courts, the matter becomes moot, and the court loses jurisdiction." *Altman v. Bedford Cent. Sch. Dist.,* 245 F.3d 49, 69 (2d Cir. 2001). As the Second Circuit has stated, "While the standing doctrine evaluates [a litigant's] personal stake as of the outset of the litigation, the mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit . . . Thus, even as to claims that plaintiffs originally had standing to assert, the court must determine whether those claims remain live controversies or have become moot." *Id.* (citing *Cook v. Colgate,* 992 F.2d 17, 19 (2d Cir. 1993)) (internal citation omitted).

"A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Freedom Party of New York v. New York State Board of Elections,* 77 F.3d 660, 662 (2d Cir. 1996) (quoting *New York City Employees' Retirement System v. Dole Food Co.,* 969 F.2d 1430, 1433 (2d Cir. 1992) (internal quotation marks omitted)). If a claim has become moot prior to the entry of final judgment, the district court generally should dismiss the claim for lack of jurisdiction. *See,*

e.g., Campbell v. Greisberger, 80 F.3d 703, 705 (2d Cir. 1996) (affirming mootness dismissal).

a) Jurisdiction at the Inception of the Lawsuit

*5 It is undisputed that the Complaint adequately alleges a Section 16(b) claim against Cadian and that Klein, as a shareholder, is a person statutorily authorized to file such a claim. *See W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP,* 549 F.3d 100, 105, 106 (2d Cir. 2008) (distinguishing statutory securities fraud standing from constitutional standing). It is similarly undisputed for purposes of this motion that Klein owned stock in Qlik at the time she filed the instant suit. Cadian nevertheless contends that the district court lacks jurisdiction because Klein does not allege that she owned Qlik stock at the time of the insider trading and therefore has no standing to sue. Defs.' Mem. at 1, 7 n.3. This argument is without merit.

The conclusion that Klein had standing to pursue the claim even though she did not hold stock at the time of the short-swing trading is consistent with the Supreme Court's determination in *Gollust. See Gollust,* 501 U.S. at 123-26 (analyzing statutory and constitutional standing in a Section 16(b) action and finding that because plaintiff was a shareholder at the time he instituted the action, standing requirements were met, and noting that "the terms of the statute do not even require that the security owner have had an interest in the issuer at the time of the defendant's short-swing trading.").

Additionally, the Second Circuit's decision in *Donoghue v. Bulldog Inv'rs Gen. P'ship,* 696 F.3d 170 (2d Cir. 2012), distinguished between statutory and constitutional standing and recognized that a statutory violation can cause an injury in fact sufficient to establish standing. In *Bulldog Investors,* the defendant argued that the plaintiff lacked standing because she "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." *Id.* at 172. There, the Second Circuit found that the plaintiff—who brought suit on behalf of an issuer—had constitutional standing to bring an action under Section 16(b) based in part on its conclusion that § 16(b) "created legal rights" that, in turn, "clarified the injury that would support standing." *Id.* at 180. Specifically, the Court held that Section 16(b) confers on issuers a legal right to the short-swing profits of insiders sufficient to establish constitutional standing. *Id.* at 175. The Second Circuit explained that under Section 16(b), a shareholder plaintiff pursues a claim on behalf of an issuer, and thus the claim "is derivative in the sense that the corporation is the instrument . . . for the effectuation of the statutory policy." *Id.* (internal quotation marks and citations omitted).

Consistent with the Supreme Court's decision in *Gollust* and the Second Circuit's decision in *Bulldog Investors,* the Court finds that Klein suffered an injury in fact that is traceable to Cadian's alleged short-swing trading. Here, as in *Bulldog Investors,* Klein filed this lawsuit on behalf of Qlik to recover short-swing profits under Section 16(b). Unlike in other derivative cases,

a Section 16(b) plaintiff is not required to plead that she was an owner of securities at the time of the alleged short-swing trading. Thus, although *Bulldog Investors* did not specifically address the question of whether the plaintiff in that case 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." *Roth v. Scopia Capital Mgmt. LP,* No. 16 Civ. 6182 (LTS), 2017 WL 3242326, at *4 (S.D.N.Y. July 28, 2017) (relying on *Bulldog Investors* in holding that a Section 16(b) derivative plaintiff had constitutional standing even though he did not own stock at the time of the short-swing trading). Accordingly, the Court finds that Klein had standing to bring this case because she owned Qlik shares at the time the lawsuit was filed.

*6 Cadian invokes the Supreme Court's recent decision in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), arguing that Klein lacks constitutional standing because she cannot demonstrate that she, as an individual, suffered a concrete and particularized injury because she was not a shareholder at the time of the alleged short-swing trading. Defs.' Mem. at 7 n.3. In *Spokeo,* the Supreme Court considered a case in which a plaintiff brought suit to enforce the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681e(b), a consumer protection statute. Spokeo was a consumer reporting agency that operated a website through which users could search for information about a

person by inputting that person's identifying information. *Id.* at 1544. Spokeo would search its databases and provide detailed information to the user about the search subject, such as his address, telephone number, marital status, or age. *Id.* at 1546. The plaintiff sued Spokeo when he learned that the company incorrectly reported information about him, which he claimed violated the FCRA. *Id.*

Plaintiff alleged that Spokeo violated his statutory rights and that his personal interests in the handling of his credit information were individualized, and thus he had standing. *Id.*; *see also Robins v. Spokeo, Inc.,* No. Civ. 10-05306 (ODW), 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011). The district court dismissed plaintiff's complaint for lack of subject matter jurisdiction based on the absence of an injury in fact sufficient to confer constitutional standing under Article III. *Spokeo,* 136 S. Ct. at 1543. The Ninth Circuit reversed, holding that based on plaintiff's allegation that Spokeo violated his statutory rights and the fact that his personal interests in the handling of his credit information are individualized, he adequately alleged an injury in fact. *Id.*

The Supreme Court reversed the Ninth Circuit, holding that standing requires an injury in fact, and 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). The injury-in-fact element requires a plaintiff to show that she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not

conjectural or hypothetical." *Id.* (citing *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992)). The Court reiterated that "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.' " *Id.* at 1549 (quoting *Lujan,* 504 U.S. at 578, 112 S.Ct. 2130). The Court added that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact" and in such circumstances, "a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified." *Id.* (emphasis in original).

The Supreme Court's unanimous decision in *Gollust* and the Second Circuit's decision in *Bulldog Investors* both pre-date *Spokeo.* However, Cadian's suggestion that *Spokeo* alters the constitutional sufficiency of the statutory standing conferred by Section 16(b) on plaintiffs who did not hold interests in an issuer at the time of the short-swing trading is unavailing. *See Roth,* 2017 WL 3242326, at *4 (considering the effect of *Spokeo* on *Bulldog Investors* in holding that a Section 16(b) derivative plaintiff had constitutional standing even though he did not own stock at the time of the short-swing trading). *Spokeo* addressed only the sufficiency of a claim brought by an individual on his own behalf, not a derivative claim brought on behalf of the corporation. *Bulldog Investors* is consistent with *Spokeo* in that the Second Circuit recognized that a statutory violation serves as a basis for Article III standing only where a violation of a statute goes hand in hand with a distinct, palpable and nontheoretical injury in fact, can. *See* 696 F.3d at 177-78. In *Bulldog Investors,* the Court did not find standing on the basis of a statutory violation alone: it

recognized that the corporate issuer (and by extension, the derivative suit plaintiff) suffered distinct and real injury in that case since its reputation of integrity and marketability of its stock were damaged by insider trading, which is a serious breach of fiduciary duty. *Id.* Moreover, *Spokeo* does not even mention *Gollust,* much less overturn it. This Court could reject the holdings in *Gollust* or *Bulldog Investors* if a showing is made that its rationale was overruled either implicitly or expressly by the Supreme Court in *Spokeo,* but no such showing has been made here. *See United States v. Ianniello,* 808 F.2d 184, 190 (2d Cir. 1986), *abrogated on other grounds by United States v. Indelicato,* 865 F.2d 1370 (2d Cir. 1989).

b) Jurisdiction After the Cash-Out Merger

*7 A more difficult constitutional question is whether the Court retained jurisdiction of the action after the cashout merger, which divested Klein's interest in Qlik. Cadian argues that Klein lost any possible economic interest in the lawsuit in late August 2016 when her shares were cashed out. Defs.' Mem. at 9. Notably here, Klein concedes that "the merger terminated her right to continue this action because she lost her personal stake in the outcome." Pl.'s Mem. at 2. Klein contends, however, that the Section 16(b) claim, which was brought on Qlik's behalf, has not been resolved, and thus the controversy lives on in this derivative action because she is a nominal plaintiff and her loss of economic interest is immaterial to Qlik's recovery. Pl.'s Mem. at 6-7.

The Second Circuit has outlined that in a Section 16(b) derivative action, there are two steps to the injury analysis. First, because a derivative action

generally is "a mere procedural device to enforce" substantive rights belonging to the issuer ... there must be injury in fact to that real party in interest." *Bulldog Inv'rs Gen. P'ship,* 696 F.3d at 175-76. Second, the Supreme Court has recognized that when an issuer's interests are pursued derivatively by a shareholder, a "serious constitutional question" would arise if the shareholder were allowed to maintain the Section 16(b) claim even after losing all personal financial interest in the outcome of the litigation. *Id.* (citing *Gollust,* 501 U.S. at 126).

Cadian argues that the Supreme Court's decision in *Gollust* dictates dismissal. Defs.' Mem. at 6-7. There, the Supreme Court addressed whether a plaintiff who properly files a Section 16(b) lawsuit loses standing due to a corporate reorganization that occurs while the action is pending. *Gollust,* 501 U.S. at 122. The plaintiff in *Gollust* was a shareholder of Viacom International, Inc. ("Viacom") at the time that he brought a Section 16(b) action on Viacom's behalf. *Id.* at 118. Viacom was then acquired by another company during the pendency of the lawsuit, and Viacom's shareholders "received a combination of cash and stock in [the new acquiring parent company] in exchange for their [Viacom] stock." *Id.* at 118-19. The Court explained that a "plaintiff must maintain a 'personal stake' in the outcome of the litigation throughout its course." *Id.* at 125. Despite the fact that the plaintiff no longer owned Viacom stock, the Supreme Court held that the plaintiff satisfied both the statutory and constitutional standing requirements because "[h]e owned a 'security' of the 'issuer' at the time he 'instituted' [the] action" and "retain[ed] a continuing financial interest in the

outcome of the litigation derived from his stock in International's sole stockholder . . ." at 127. Thus this continuing—albeit indirect—interest sufficed to confer standing because the plaintiff would benefit if the action succeeded. *See id.*

Further, in *Gollust,* the Supreme Court explained that "Congress must, indeed, have assumed any plaintiff would maintain some continuing financial stake in the litigation ... [f]or if a security holder were allowed to maintain a § 16(b) action after he had lost any financial interest in its outcome, there would be serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation on federal court jurisdiction." *Gollust,* 501 U.S. at 125-26.[8] The Supreme Court did not need to reach that question because it found that the plaintiff's continuing financial interest in the acquiring company was sufficient to satisfy the case and controversy

[8] The parties dispute the appropriate analytical framework the Court should apply here. Cadian argues that Klein lacks standing, but Klein asserts that Cadian conflates standing and mootness because "standing refers to the interest that the plaintiff must have at the inception of the litigation; mootness occurs when a plaintiff loses that interest during the course of the case." Pl.'s Mem. at 3. Klein argues this distinction is important because whereas a plaintiff bears the burden of demonstrating standing, the defendant bears the burden of proving that a case has become moot, and because Courts analyze the mootness doctrine with more "flexibility." *Id.* at 3-4. While it may be true that courts have distinguished between standing and mootness, the Supreme Court in analyzing whether a "plaintiff would maintain some continuing financial stake" in a Section 16(b) litigation has indicated that the applicable doctrine is that of standing. *Gollust,* 501 U.S. at 125-26.

requirement. The issue before this Court is the precise question the Supreme Court did not reach —whether subject matter jurisdiction still exists where it is undisputed that the individual plaintiff has lost her personal financial stake in the outcome of the litigation due to divestment.[9]

*8 Here, unlike in *Gollust,* Klein has no continuing financial interest, direct or indirect, in the issuer's new parent corporation. Under the terms of the merger agreement, each share of Qlik common stock was cancelled and converted to the right to receive $30.50 in cash with no provision of stock in the surviving corporation. Thus, Klein concedes that because she received cash, she lost all personal financial interest in the outcome of the Section 16(b) litigation, and this fact alone is dispositive of her lack of standing. *See Gollust,* 501 U.S. at 126 ("[T]he plaintiff must maintain a 'personal stake' in the outcome of the litigation throughout its course."); Romeo & Dye § 9.03[2][a][iv] ("A plaintiff-security holder who institutes a Section 16(b) lawsuit must maintain a continuous financial interest in the lawsuit throughout the litigation.").

c) Substitution Under Rule 17

The Court now must consider whether Klein is still able to substitute Qlik as a plaintiff even though she lacks personal standing. Plaintiff argues that dismissing the action entirely due to Klein's loss of her

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[9] In *Bulldog Investors,* the Second Circuit also did not address this constitutional question because there was no dispute concerning the plaintiff's continuing financial stake in the litigation. *See Bulldog Inv'rs,* 696 F.3d. at 176.

shareholder interest undermines the public policy of Section 16(b). Pl.'s Mem. at 12. While it may be true that the statute recruits the issuer or stockholders to enforce the law's prohibition on short-swing trading by insiders, even Congress cannot bypass the constitutional requirements of standing. While "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules . . . Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself."

Robainas v. Metro. Life Ins. Co., No. 14 Civ. 9926 (DLC), 2015 WL 5918200, at *6 (S.D.N.Y. Oct. 9, 2015), *aff'd sub nom. Ross v. AXA Equitable Life Ins. Co.,* 680 Fed.Appx. 41 (2d Cir. 2017) (internal quotation marks and citation omitted). "Cases recognizing that a federal statutory violation can confer standing rely on finding a concrete injury in making that determination." *Id.* (listing cases). While it is well settled law that, since recovery is for the corporation, a corporation is the real party in interest and the stockholder plaintiff is but "the mere vehicle of recovery" in a Section 16(b) action, *Blau v. Lamb,* 314 F.2d 618, 619 (2d Cir. 1963), no authority suggests that Congressional policy overrides Article III's requirements. *See Bulldog Inv'rs,* 696 F.3d at 180 ("Although Congress had a "general interest in safeguarding the integrity of the stock market" when it enacted Section 16(b) of the Securities Exchange Act of 1934 and required short-swing profits to be disgorged, "it did not eliminate the injury requirement of standing.").

For the same reason, Klein's argument that Qlik should be allowed to substitute as the "real party in interest" under Rule 17(a) even though she lacks a continuing personal interest in the litigation also fails: Rule 17(a) cannot create jurisdiction that does not exist. Although the Second Circuit has not considered the precise issue of whether a real party in interest may be substituted under Rule 17 where an original Plaintiff loses her interest in the litigation after commencement of the action, the recent case of *Cortlandt St. Recovery Corp. v. Hellas Telecommunications,* 790 F.3d 411 (2d Cir. 2015), is instructive. In *Cortlandt Street,* the district court held that the plaintiff lacked standing to pursue contract claims because of the lack of a valid assignment. *Id.* at 418. On appeal, the plaintiff argued that even if it lacked constitutional standing, the district court erred in denying its request to amend the complaint to cure that deficiency by means of either a substitution or an assignment pursuant to Rule 17(a)(3). *Id.* at 420, 422. The Second Circuit did not reach the issue of whether a substitution under Rule 17 is permissible even where a plaintiff lacks standing as to all of her claims because it found that neither of the plaintiff's contemplated substitution and assignments were allowed under Rule 17(a)(3). *Id.* at 423.

*9 In dictum, however, *Cortlandt Street* considered that the Sixth Circuit in *Zurich Insurance Co. v. Logitrans,* Inc., 297 F.3d 528, 531 (6th Cir. 2002), held that where a plaintiff has no standing at the outset of litigation, it cannot "make a motion to substitute the real party in interest." 790 F.3d at 423. The Second Circuit also noted that *Zurich* has been "met with some criticism" and quoted a leading

treatise that characterized it as "troubling." *Id.* (citing 13A Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 3531 n. 61 (3d ed. 2014)). The author of the *Cortlandt Street* majority opinion also wrote a concurrence in which he emphasized that *Zurich* was not the law of the Second Circuit, and suggested that it should not be. *See Cortlandt Street,* 790 F.3d at 425 (Sack, J., concurring).

Despite the Second Circuit's cautionary dictum regarding *Zurich,* the Second Circuit has repeatedly emphasized that "Rule 17 does not ... affect jurisdiction and relates only to the determination of proper parties and the capacity to sue." *Oscar Gruss & Son, Inc. v. Hollander,* 337 F.3d 186, 193-94 (2d Cir. 2003) (citing 4 James William Moore, et al., Moore's Federal Practice § 17.13 (3d ed. 1999)); *Lunney v. United States,* 319 F.3d 550, 557 (2d Cir. 2003) ("Rule 17(a) cannot be construed to extend subject matter jurisdiction."); *Airlines Reporting Corp. v. S and N Travel, Inc.,* 58 F.3d 857, 861 n. 4 (2d Cir. 1995) ("Rule 17(a) ... is a procedural rule which does not extend or limit the subject matter jurisdiction of a federal court."); *see also Lincoln Prop. Co. v. Roche,* 546 U.S. 81, 90 (2005) (Rule 17(a) "address[es] party joinder, not federal-court subject-matter jurisdiction"). It is also well-settled law that the Federal Rules of Procedure cannot expand jurisdiction beyond its constitutional limits. *See* Fed. R. Civ. P. 82 ("[The Federal Rules of Civil Procedure] do not extend or limit the jurisdiction of the district courts ..."); *Kent v. N. California Reg'l Office of Am. Friends Serv. Comm.,* 497 F.2d 1325, 1329 (9th Cir. 1974) ("There is no doubt that ... the trustees are the real party in interest by virtue of Fed. R. Civ. P. 17(a). But Rule 17(a) means

only that the trustees have a real interest in the trust fund. Rule 17(a) does not give them standing; 'real party in interest' is very different from standing.") (citing 6 C. Wright & A. Miller, Federal Practice and Procedure § 1542, at 641 (1971)).[10]

Thus, even if the Court were to find that Qlik is a real party in interest, its amenability to substitution under Rule 17(c) cannot alter Klein's lack of constitutional standing.[11] No fewer than four other district courts in the Second Circuit have reached similar conclusions. *See Tech-Sonic, Inc. v. Sonics & Materials, Inc.,* No. 3:12 Civ. 01376 (MPS), 2016 WL 3962767, at *15 (D. Conn. July 21, 2016) (analyzing opinions from district courts in the Second Circuit and holding that "Rule 17 cannot cure a standing defect if, as here, a court lacks jurisdiction over all the claims in the case"); *Clarex Ltd. v. Natixis Sec. Am. LLC,* No. 12 Civ. 0722 (PAE), 2012 WL 4849146, at *7-8 (S.D.N.Y. Oct. 12, 2012) (rejecting an argument that a plaintiff who lacked standing could remedy the jurisdictional defect under Rule 17, and noting that "where courts in

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[10] Klein erroneously conflates the standing and real party in interest analyses. Standing and real party in interest issues overlap "to the extent that the question in both is whether the plaintiff has a personal interest in the controversy." *Whelan v. Abell,* 953 F.2d 663, 672 (D.C. Cir. 1992) (citing 6A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1524, at 329-30 (1990)).

[11] The same is true for Klein's motion for substitution under Rule 25(c). "As to subject matter jurisdiction, Rule 25(c) does not change the constitutional requirement that an actual case or controversy must exist throughout a lawsuit." *Reibman v. Renesas Elecs. Am., Inc.,* No. 11 Civ. 03847 (JCS), 2014 WL 251955, at *7 (N.D. Cal. Jan. 7, 2014).

this Circuit have used . . . Rule 17(a) (3) to remedy defects in standing they have generally done so where the plaintiff clearly had standing on another claim that it brought."); *In re SLM Corp. Sec. Litig.,* 258 F.R.D. 112, 116 (S.D.N.Y. 2009) (declining to approve assignment of claims because "the majority of courts to allow an assignment of claims after the onset of litigation do so only where plaintiff had constitutional standing on another claim"); *Bd. for Managers of Mason Fisk Condo. v. 72 Berry St., LLC,* 801 F. Supp. 2d 30, 39-40 (E.D.N.Y. 2011) (Rule 17 "cannot expand the Court's jurisdiction" and cannot "retroactively cure [a] jurisdictional deficiency.' ").[12]

*10 Because Klein has no standing, there is no jurisdiction, and the action must be dismissed. *See In re Mercury Interactive Corp. Derivative Litig.,* 487 F. Supp. 2d 1132, 1134-35 (N.D. Cal. 2007) (in a Section 16(b) lawsuit, also initiated by Klein and her counsel,

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[12] To be sure, there have been cases in which courts in this Circuit have used Rule 17(a) to cure standing deficiencies. For example, in *Digizip.com Inc. v. Verizon Services Corp.,* 139 F. Supp. 3d 670 (S.D.N.Y. 2015), upon which Klein relies, the court held that the plaintiff had Article III standing, but lacked prudential standing, which the court allowed plaintiff to cure through Rule 17. The Court noted that the "use of Rule 17(a)(3) does not expand the constitutional limits of standing." *Id.* at 679. *See also In re Vivendi Universal, S.A. Secs. Litig.,* 605 F.Supp.2d 570, 584 (S.D.N.Y. 2009) (holding some plaintiffs had third party standing, and those who did not could cure their standing problems with assignments). Subsequent courts have distinguished those decisions, noting that "where courts in this Circuit have used of Rule 17(a)(3) to remedy defects in standing, they have generally done so where the plaintiff clearly had standing on another claim that it brought." *Clarex,* 2012 WL 4849146, at *8.

finding that plaintiff was divested of any interest in the litigation by the sale of her shares in the issuer for cash, and thus she lacked standing to pursue the action on behalf of that issuer); *see also Blasband v. Rales,* 971 F.2d 1034, 1041 (3d Cir. 1992) (applying Delaware law and holding that "[w]here there has been a cash-out merger, it is clear that a former shareholder may not maintain a derivative action, for he or she would no longer have an interest in a subsequent corporate recovery. However, where . . . the plaintiff receives shares of a new corporate entity, the standing issue is less clear, as the plaintiff will have a financial interest in the derivative action.") (internal citation omitted).

B. Motion to Substitute the Plaintiff

For the reasons discussed above, because the Court no longer has jurisdiction over this matter, the Court will not consider Plaintiff's arguments on the merits regarding substitution of Qlik as a Plaintiff. *See Steel Co.,* 523 U.S. at 101-02 ("For a court to pronounce upon [the merits] when it has no jurisdiction to do so . . . is . . . for a court to act ultra vires."); *Sikhs for Justice Inc. v. Indian Nat'l Cong. Party,* 17 F. Supp. 3d 334, 348 (S.D.N.Y.), *aff'd sub nom. Sikhs for Justice, Inc. v. Nath,* 596 Fed.Appx. 7 (2d Cir. 2014) ("Given that the Court lacks jurisdiction to hear Plaintiffs' case, the Court will not reach dismissal on the merits."); *Capellupo v. Webster Cent. Sch. Dist.,* No. 13 Civ. 6481 (EAW), 2014 WL 6974631, at *4 (W.D.N.Y. Dec. 9, 2014) ("Because the Court concludes that it lacks jurisdiction, it will not consider the merits-based

arguments raised by Defendants because to do so would be an exercise of jurisdiction.").[13]

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[13] Even if the Court had standing to entertain Plaintiff's motion, the motion would fail. As the Second Circuit has explained, the dismissal provision in Rule 17(a)(3) was added "to avoid forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought" and "codifies the modern judicial tendency to be lenient when an *honest mistake* has been made in selecting the proper plaintiff." *Cortlandt St. Recovery Corp.,* 790 F.3d at 421 (emphasis added); *see also Bd. of Managers of Mason Fisk Condo.,* 801 F. Supp. 2d at 40 ("Even if the Rule could retroactively cure the jurisdictional deficiency, the Board has failed to show the injustice or excusable mistake that courts have required before applying Rule 17(a)(3)."). No such honest mistake in selecting the proper party was made here. Section 16(b) clearly authorizes both the issuer of the security traded in violation of Section 16(b) or "the owner of any security of the issuer in the name and in behalf of the issuer." 15 U.S.C. § 78p(b). Here, Klein demanded that Qlik sue Cadian based on their alleged short-swing trading, but Qlik declined Klein's demand to sue. Compl. ¶ 36. It was only after the cash-out merger divested Klein of her shares—and thirteen months after she filed the lawsuit—that Qlik decided to litigate the Section 16(b) claims on its own behalf. In short, this is not a classic Rule 17(a)(3) scenario where a litigant inadvertently failed to bring a claim in the name of the real party in interest; Qlik was not a plaintiff because it chose not to be a plaintiff. Additionally, the modern function of Rule 17 is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." *Cortlandt St. Recovery Corp.,* 790 F.3d at 421. Neither of those risks are present here. Moreover, Rule 25(c) addresses the addition of a party pursuant to a transfer of interest that occurs after the filing of the complaint to bring a successor in interest into court when "it has come to own the property in issue." *Negrón-Almeda v. Santiago,* 579 F.3d 45, 53 (1st Cir. 2009). Klein's substitution motion based on Rule 25(c) is inappropriate because Qlik is not a transferee of any interest of Klein.

IV. CONCLUSION

*11 For the reasons stated above, Cadian's motion to dismiss the Complaint is GRANTED and Klein's motion to substitute Qlik is DENIED. The Clerk of the Court is respectfully directed to terminate the motions, Docs. 31 and 37, and close the case.

It is SO ORDERED.

APPENDIX C

United States Court of Appeals
for the Second Circuit

ORDER
Docket No. 17-3218

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of November, two thousand eighteen.

Terry Klein, derivatively on behalf of Qlik Technologies, Inc.,

Plaintiff -Appellant,

v.

Qlik Technologies, Inc.,

Defendant-Appellant,

v.

Cadian Capital Management, LP, Cadian Fund LP, Cadian Master Fund LP, Cadian GP, LLC, Cadian Capital Management GP, LLC, Eric Bannasch,

Defendants-Appellees.

Appellees, Cadian Capital Management, LP, Cadian Fund LP, Cadian Master Fund LP, Cadian GP, LLC, Cadian Capital Management GP, LLC, and Eric Bannasch, filed a petition for panel rehearing, or, in

the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe, Clerk

APPENDIX D

RELEVANT CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

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

Section 2.

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.

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Securities Exchange Act of 1934, § 16(a)–(b), 15 U.S.C. § 78p(a)–(b)

§ 78p. Directors, officers, and principal stockholders

(a) Disclosures required

(1) Directors, officers, and principal stockholders required to file

Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission.

(2) Time of filing

The statements required by this subsection shall be filed—

(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title;

(B) within 10 days after he or she becomes such beneficial owner, director, or officer, or within such shorter time as the Commission may establish by rule;

(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement involving such equity security, before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

(3) Contents of statements

A statement filed—

(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements or security-based swaps as have occurred since the most recent such filing under such subparagraph.

(4) Electronic filing and availability

Beginning not later than 1 year after July 30, 2002—

(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.

(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.

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Federal Rule of Civil Procedure 17(a)

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) REAL PARTY IN INTEREST.

(1) *Designation in General.* An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) *Action in the Name of the United States for Another's Use or Benefit.* When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) *Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.