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No. 08-905

In the Supreme Court of the United States

MERCK & CO., INC., ET AL., PETITIONERS

v.

RICHARD REYNOLDS, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Under 28 U.S.C. 1658(b), a plaintiff in a private securities-fraud action must file suit within two years of "the discovery of the facts constituting the violation." It is well established that the limitations period in Section 1658(b) is triggered by constructive discovery of the "facts constituting the violation," with the result that the plaintiff need not have actual knowledge of all of the relevant facts for the limitations period to begin running. It is also well established that Section 1658(b) incorporates the principle of inquiry notice, under which a plaintiff who possesses information sufficiently suggestive of wrongdoing should conduct a further inquiry to confirm the existence of his claim. The question presented is as follows:

Whether the court of appeals erred by holding that, for purposes of determining when the limitations period begins to run, a plaintiff is not on inquiry notice of a securities-fraud claim until the plaintiff possesses information, obtained without the benefit of any investigation, that the defendant acted with scienter.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Merck & Co., Inc. (Merck); and David Anstice, Lawrence A. Bossidy, William G. Bowen, Richard T. Clark, Celia Colbert, Johnnetta B. Cole, Linda M. Distlerath, Caroline Dorsa, Lloyd C. Elam, Kenneth C. Frazier, Raymond V. Gilmartin, William B. Harrison Jr., Richard C. Henriques Jr., Bernard J. Kelley, William N. Kelley, Peter S. Kim, Judy C. Lewent, Per G.H. Lofberg, Heidi G. Miller, Alise S. Reicin, Edward M. Scolnick, Thomas E. Shenk, Anne M. Tatlock, Samuel O. Thier, and Per Wold-Olsen, current or former directors, officers, or employees of Merck. Merck has no parent corporation, and no publicly held company owns 10% or more of Merck's stock. As has been reported in the news media, Merck has entered into an agreement under which, if certain conditions are met, Merck will merge with Schering-Plough Corporation; that merger has not yet been consummated.

Respondents are Richard Reynolds; Jan Charles Finance S.A.; Park East, Inc.; Public Employees' Retirement System of Mississippi; Union Asset Management Holding AG; Loren Arnoff; Robert Edwin Burns; Joseph S. Fisher; Joseph Goldman; Jerome Haber; Rhoda Kanter; Sherrie B. Knuth; Steven LeVan; Martin Mason; Marc Nathanson; Naomi Raphael; Frank H. Saccone; Charlotte Savarese; and Joe Savarese.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 543 F.3d 150. The opinion of the district court (Pet. App. 62a-99a) is reported at 483 F. Supp. 2d 407.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2008. A petition for rehearing was denied on October 17, 2008 (Pet. App. 100a-101a). The petition for a writ of certiorari was filed on January 15, 2009, and granted on May 26, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In relevant part, 28 U.S.C. 1658(b) provides:

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws * * * may be brought not later than the earlier of—
> (1) 2 years after the discovery of the facts constituting the violation; or
> (2) 5 years after such violation.

STATEMENT

Petitioners are Merck & Co., Inc. (Merck), and several of its current and former directors, officers, and employees; respondents are purchasers of Merck stock. Beginning on November 6, 2003, various plaintiffs brought sixteen actions against Merck in federal district courts, claiming, *inter alia*, that Merck had engaged in securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. The Judicial Panel on Multidistrict Litigation transferred those actions filed in other districts to the District of New Jersey, and respondents subsequently filed a consolidated amended class-action complaint against Merck and the individual petitioners. As is relevant here, petitioners moved to dismiss respondents' securities-fraud claim on the ground that it was time-barred because respondents were on inquiry notice of that claim before November 6, 2001—*i.e.*, more than two years before the initial version of their complaint was filed. The district court granted petitioners' motion to dismiss, Pet. App. 62a-99a, but a divided court of appeals reversed and remanded, *id.* at 1a-61a.

1. Merck is one of the Nation's largest pharmaceutical companies. In the mid-1990s, Merck developed Vioxx, one of a class of anti-inflammatory medicines known as "COX-2 inhibitors." As the name suggests, COX-2 inhibitors selectively inhibit the production of an enzyme known as cyclooxygenase-2 (COX-2), which is involved in the body's generation of pain and inflammation. By contrast, other anti-inflammatory medicines such as aspirin, ibuprofen, and naproxen operate by inhibiting the production not only of COX-2, but also of cyclooxygenase-1 (COX-1), which protects the lining of the gastrointestinal tract. The inhibition of COX-1 can lead to serious, even fatal, gastrointestinal problems. Because COX-2 inhibitors such as Vioxx have no significant effect on COX-1, their development was viewed as an important milestone in the management of both chronic and acute pain. In May 1999, the Food and Drug Administration (FDA) approved Vioxx for various prescription uses, and Merck brought Vioxx to market. Pet. App. 5a, 64a.

Even after FDA's initial approval, Merck continued to conduct extensive studies of Vioxx's safety and efficacy. From January 1999 to March 2000, Merck conducted the Vioxx Gastrointestinal Outcomes Research (VIGOR) study, which examined the comparative gastrointestinal safety of Vioxx and naproxen. The VIGOR study confirmed that patients on Vioxx had a lower rate of gastrointestinal events, but also indicated that those patients had a higher rate of certain cardiovascular events. One possible explanation for the latter disparity was that, when taken in a particular manner, naproxen inhibited platelet aggregation, prevented blood clots, and thus lowered the risk of those cardiovascular events; this theory came to be known as the "naproxen hypothesis." Another possible explanation was that Vioxx somehow increased the potential for blood clots. On March 27,

2000, Merck announced the preliminary results of the VIGOR study. In a press release, Merck noted the disparity in cardiovascular events and stated that the disparity was "consistent with naproxen's ability to block platelet aggregation." At the same time, Merck acknowledged that "[t]his effect * * * had not been observed previously in any clinical studies for naproxen." J.A. 291; Pet. App. 5a-7a, 64a-65a.

In the wake of the VIGOR study, there was extensive public debate about the competing explanations for the disparity in cardiovascular events. For example, on April 27, 2000, Reuters reported that at least one analyst "was not reassured by Merck's suggestion that naproxen conferred protection against heart attacks and strokes." On February 8, 2001, FDA's Arthritis Advisory Committee held a public hearing to discuss the safety of Vioxx, which provoked a wave of articles in the news media. The following day, USA Today reported that "[a]rthritis patients who take Vioxx * * * should know that the blockbuster drug might increase their risk of suffering a heart attack." And on August 22, 2001, the Journal of the American Medical Association (JAMA) published an article reporting that available data raised a "cautionary flag" about the possibility that COX-2 inhibitors such as Vioxx were linked to an increased risk of cardiovascular events. The JAMA article provoked another wave of articles in the news media. J.A. 319, 332, 358, 362, 413; Pet. App. 7a-11a, 65a-71a.

Consistent with its initial press release announcing the preliminary results of the VIGOR study, Merck continued to express its belief that the "likely" explanation for the disparity in cardiovascular events was that naproxen prevented blood clots. On September 17, 2001, however, FDA issued a "Warning Letter" to Merck in which it charged that Merck had "engaged in a promo-

tional campaign for Vioxx that minimizes the potentially serious cardiovascular findings that were observed in the [VIGOR] study, and thus, misrepresents the safety profile for Vioxx." FDA contended that, "[a]lthough the exact reason for the increased rate of [cardiovascular events] observed in the Vioxx treatment group is unknown," Merck had "selectively present[ed] [a] hypothetical explanation for the observed increase": namely, that "Vioxx does not increase the risk of [cardiovascular events] and that the VIGOR finding is consistent with naproxen's ability to block platelet aggregation." FDA acknowledged that "[t]hat is a possible explanation," but alleged that Merck had "fail[ed] to disclose that [its] explanation is hypothetical, has not been demonstrated by substantial evidence, and that there is another reasonable explanation, that Vioxx may have pro-thrombotic [*i.e.*, clot-promoting] properties." The letter demanded that Merck cease the cited promotional activities and issue a corrective letter. J.A. 339, 340, 352-353.

FDA posted the warning letter on its website on Friday, September 21, 2001. In the following days, the letter received extensive coverage in the news media. On September 24, Reuters reported that "U.S. regulators have charged [Merck] with misleading doctors about its blockbuster painkiller Vioxx with promotions that downplayed a possible risk of heart attacks." And on September 25, the Wall Street Journal reported that "[f]ederal regulators warned [Merck] for improper marketing of its blockbuster arthritis drug Vioxx, saying the company had misrepresented the drug's safety profile and minimized its potential risks." The article further noted that, "[w]hile the FDA sends out dozens of routine citations annually, it issues only a handful of these more-serious warning letters each year." J.A. 482, 494; Pet. App. 11a-15a, 71a-75a.

Even before the release of the FDA warning letter, various plaintiffs had begun to file lawsuits alleging that Merck had made misstatements concerning the cardiovascular risks associated with Vioxx. On May 29, 2001, a group of plaintiffs filed a product-liability class action against Merck in the United States District Court for the Eastern District of New York, alleging that "users of Vioxx were four times as likely to suffer heart attacks as compared to [users of] other less expensive medications" but that Merck had "taken no affirmative steps to communicate this critical information to class members." J.A. 868, 869; Pet. App. 10a, 76a.

In the immediate aftermath of the FDA warning letter, several additional suits were filed. On September 27, 2001, a group of plaintiffs filed a consumer-fraud class action against Merck in New Jersey state court, relying on the FDA warning letter and alleging that Merck "omitted, suppressed, or concealed material facts concerning the dangers and risks associated with the use of Vioxx" and that Merck "purposefully downplayed and/or understated the serious nature of the risks associated with Vioxx." On September 28, a group of plaintiffs filed a product-liability and consumer-fraud action against Merck in Utah state court, also relying on the FDA warning letter and alleging that Merck had "misrepresented that Vioxx was * * * safe and effective * * * when in fact the drug causes serious medical problems such as an increased risk of cardiovascular events." And on October 1, a plaintiff filed a product-liability action against Merck in Alabama state court, alleging that Merck had failed to disclose that "Vioxx causes heart attacks." J.A. 885, 893, 910-911, 949, 954; Pet. App. 15a, 77a-78a.

On October 9, 2001—still more than two years before the initial version of the complaint at issue here was

filed—the New York Times published a lengthy article entitled, "For Pain Reliever, Questions of Risk Remain Unresolved." That article reported on the FDA warning letter and noted that "some heart specialists say they are now telling patients that they may want to consider taking other drugs for pain." The article quoted Dr. Edward Scolnick, a petitioner in this case and then-president of Merck Research Laboratories, as stating that "[t]here are two possible interpretations" of the data indicating the disparity in cardiovascular events and that none of the findings to date had been sufficient to prove that the issue was fully resolved. J.A. 502, 503, 504-505; Pet. App. 15a-17a, 75a-76a.

2. On November 6, 2003—shortly after a disappointing earnings report that caused Merck's stock price to drop considerably—a plaintiff filed a class action against Merck in the United States District Court for the Eastern District of Louisiana. See Pet. App. 18a. The plaintiff in that action claimed, *inter alia*, that Merck had made fraudulent misstatements and omissions concerning Vioxx, in violation of Section 10(b) of the 1934 Act and Rule 10b-5 thereunder.

After the initial complaint was filed, study data indicated that certain patients taking Vioxx for prolonged periods had a higher rate of cardiovascular events relative to patients taking a placebo. On September 30, 2004, promptly after learning of the data, Merck withdrew Vioxx from sale. Pet. App. 18a-19a, 78a-79a. Both before and after the withdrawal, various plaintiffs filed fifteen other federal securities-fraud actions against Merck. The Judicial Panel on Multidistrict Litigation then transferred the securities-fraud actions filed in other districts to the District of New Jersey. See J.A. 15-19.

On June 14, 2005, respondents filed a consolidated amended class-action complaint in the District of New

Jersey against Merck and the individual petitioners, claiming, *inter alia*, that Merck and some of the individual petitioners had engaged in securities fraud in violation of Section 10(b). See J.A. 20-264 (Fourth Amended Complaint). Respondents alleged that the identified petitioners had "made a series of materially false and misleading statements and omissions concerning * * * the safety profile of Merck's prescription painkilling drug VIOXX": specifically, by "concealing and minimizing the significantly increased risk of heart attacks in patients taking the drug." J.A. 24, 26.

As is relevant here, petitioners moved to dismiss respondents' securities-fraud claim based on the statute of limitations.[1] A plaintiff in a private securities-fraud action must file suit within two years of "the discovery of the facts constituting the violation." 28 U.S.C. 1658(b). Petitioners contended that respondents' claim was time-barred because respondents were on inquiry notice of that claim before November 6, 2001—*i.e.*, more than two years before the initial version of the complaint was filed.

The district court granted petitioners' motion to dismiss. Pet. App. 62a-99a. The court reasoned that, in order to have inquiry notice of a securities-fraud claim, "plaintiffs need not have actual knowledge or know all of the details of the alleged fraud to trigger the limitations period." *Id.* at 83a. Instead, a plaintiff need only possess

[1] In addition to their securities-fraud claim, respondents brought numerous claims under other provisions of the Securities Act of 1933 and the 1934 Act, see J.A. 252-261; petitioners also moved to dismiss those claims based on the applicable statutes of limitations. The district court held that all of respondents' claims were time-barred. See Pet. App. 98a-99a. In reversing the district court, the court of appeals specifically addressed the timeliness only of respondents' securities-fraud claim. See *id.* at 46a, 48a n.17.

enough information to "alert a reasonable person to the probability that misleading statements or significant omissions had been made." *Id.* at 83a-84a (internal quotation marks and citation omitted). Once a plaintiff is on inquiry notice, the court continued, "plaintiffs have an obligation to investigate the basis for their claims." *Id.* at 84a. Specifically, "plaintiffs must show that they undertook their duty to investigate the basis for their claims but nevertheless failed to discover information necessary to initiate a securities fraud action." *Ibid.* If a plaintiff "[c]hoos[es] not to investigate," he will be deemed to have discovered his claim as of the date of inquiry notice. *Ibid.*

Applying that standard, the district court held that respondents were on inquiry notice of their securities-fraud claim by no later than October 9, 2001, the date of the New York Times article. Pet. App. 84a-98a. In so holding, the court first focused on the FDA warning letter. *Id.* at 85a-86a. The court noted that the warning letter "charges Merck with engaging in deceptive and misleading conduct with regard to the safety profile of VIOXX," *id.* at 85a, and that "the accusations in the Warning Letter have particularly strong impact in light of the fact that they are leveled by Merck's principal regulator," *id.* at 86a. The court determined that "[a] reasonable investor in Merck would have discovered this public, company-specific information and recognized it as a storm warning of fraud." *Ibid.*

The district court explained that it "might arguably conclude that the FDA Warning Letter alone [was] sufficient to put [respondents] on inquiry notice of their claims against Merck." Pet. App. 86a. The court reasoned, however, that it "need not make that conclusion, because the FDA Warning Letter was not issued in a vacuum of information." *Id.* at 87a. The court noted that

"information raising at the very least doubts as to the safety profile of VIOXX accumulated in the public realm prior to the issuance of the Warning Letter" and that "[p]ublic discussion of possible troubles at Merck continued, and it may even be said intensified[,] immediately following the publication of the Warning Letter." *Id.* at 88a. The court also cited the initiation of other Vioxx-related lawsuits. *Id.* at 89a. While acknowledging that those suits "plead for relief under different legal theories than those at issue here," the court observed that "the lawsuits are predicated upon the same alleged wrongdoing." *Ibid.* Based on all of the foregoing information, the district court stated that "the torrent of publicity" concerning Vioxx was "more akin to thunder, lightning and pouring rain than subtle warnings of a coming storm," *id.* at 94a, and determined that "it is clear that storm warnings of fraud by the company existed more than two years before this Complaint was filed," *id.* at 97a.

The district court noted that respondents "have not argued that they conducted a diligent investigation" and that "nothing in the Complaint demonstrates that they were unable to uncover pertinent information during the limitations period." Pet. App. 98a. For that reason, the court concluded that the limitations period was triggered as of the date of inquiry notice, and that respondents' securities-fraud claim was therefore time-barred. *Ibid.*

3. A divided court of appeals reversed and remanded. Pet. App. 1a-61a.

a. The court of appeals first explained that "[w]hether the plaintiffs, in the exercise of reasonable diligence, should have known of the basis for their claims depends on whether they had sufficient information of possible wrongdoing to place them on inquiry notice or to excite storm warnings of culpable activity." Pet. App. 22a (internal quotation marks and citation omitted). If

they did, "the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discover their injuries." *Ibid.* (internal quotation marks and citation omitted). Critically for present purposes, the court took the position that, "to trigger storm warnings of culpable activity in the context of a claim alleging falsely-held opinions or beliefs, investors must have sufficient information to suspect that the defendant engaged in culpable activity, i.e., that they did not hold those opinions or beliefs in earnest." *Id.* at 33a (internal quotation marks and citation omitted).

Applying that standard, the court of appeals held that the district court had erred by determining that respondents were on inquiry notice by no later than October 9, 2001. Pet. App. 35a-47a. The court of appeals suggested that the FDA warning letter was insufficient to place respondents on inquiry notice. *Id.* at 42a-45a. The court reasoned that "FDA was acting as a regulator of drug advertising, rather than as a regulator of the securities markets," *id.* at 42a, and that "FDA did not charge that the naproxen hypothesis was wrong" but instead "simply directed Merck to be more clear about the widely known alternative hypothesis," *id.* at 43a. The court of appeals also discounted the district court's reliance on the filing of other lawsuits challenging the accuracy of Merck's representations concerning Vioxx. *Id.* at 45a. The court of appeals noted that "none of th[o]se lawsuits alleged securities fraud" and that "[t]he claims in those lawsuits alleged that Merck failed to provide publicly available information to Vioxx consumers, rather than to Merck investors." *Ibid.*

b. Judge Roth dissented. Pet. App. 49a-61a. She agreed with the district court that " 'storm warnings' alerting a reasonable investor of *possible* culpable activity on the part of Merck were evident more than two

years prior to the filing of [respondents'] complaint." *Id.* at 49a. Judge Roth explained that "any reasonable investor reading the [FDA] warning letter could see the problem with Vioxx": *viz.*, "the 'possibility' that Merck had fraudulently misrepresented the cardiovascular safety of its 'blockbuster' product." *Id.* at 51a. She added that, "[i]n response to the FDA's warning letter, there was widespread media and financial analyst coverage commenting on the FDA's charges against Merck." *Id.* at 56a. And she noted the filing of other lawsuits, observing that "the general allegations contained within these complaints relating to Merck's intentional misrepresentation with regard to Vioxx's safety similarly formed the basis of [respondents'] complaint." *Id.* at 58a. Because respondents did not contend that they had conducted a diligent investigation, Judge Roth would have concluded that the limitations period was triggered as of the date of inquiry notice, and that respondents' securities-fraud claim was therefore time-barred. *Id.* at 61a.

c. Petitioners filed a petition for panel rehearing, which was denied by a 2-1 vote, and a petition for rehearing en banc, which was denied by a 6-4 vote. Pet. App. 100a-101a. Judge Roth would have granted panel rehearing, and Judges Rendell, Ambro, Fuentes, and Jordan would have granted rehearing en banc. *Id.* at 101a.[2]

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[2] On remand, respondents filed another amended version of their complaint. See J.A. 270-290 (Fifth Amended Complaint). Petitioners then moved to dismiss the amended complaint on the grounds, *inter alia*, that respondents had failed either to allege an actionable misstatement or omission or to allege facts sufficient to permit a strong inference that petitioners acted with scienter. See J.A. 11-14. The district court has stayed proceedings on remand pending this Court's decision. See J.A. 14.

SUMMARY OF ARGUMENT

A. The court of appeals erred by holding that, for purposes of determining when the limitations period begins to run, a plaintiff is not on inquiry notice of a securities-fraud claim until the plaintiff possesses information that the defendant acted with scienter.

Under 28 U.S.C. 1658(b), a plaintiff in a private securities-fraud action must file suit within two years of "the discovery of the facts constituting the violation." As a preliminary matter, lower courts have consistently held, and Congress ratified the understanding, that the limitations period for securities-fraud claims is triggered by constructive discovery of the "facts constituting the violation": *i.e.*, when the plaintiff *should have* known of the relevant facts, even if he did not *actually* know of those facts until a later date.

It is similarly well established that the discovery rule for securities-fraud claims incorporates the principle of inquiry notice. Under that principle, a court must determine when the plaintiff possessed sufficient information to cause him to suspect the possibility that the defendant has engaged in wrongdoing, so as to trigger a duty to investigate further to confirm the existence of his claim. In order to satisfy the standard for inquiry notice, a plaintiff need not possess information specifically bearing on each and every element of the underlying violation. That general rule is equally, if not more, applicable in the context of securities-fraud claims. When a plaintiff has reason to believe that a defendant has made a material misstatement or omission in connection with the purchase or sale of a security, the plaintiff ordinarily should at least suspect the possibility that the defendant did so with scienter and therefore committed securities fraud. The court of appeals' contrary rule is entirely

without foundation, and, if adopted, it would essentially render the principle of inquiry notice a dead letter.

Under the correct legal standard, respondents were on inquiry notice of their claim more than two years before the initial version of the complaint was filed, because they possessed considerable information suggesting the possibility that petitioners had engaged in securities fraud in connection with their statements concerning Vioxx. Indeed, even under the court of appeals' more liberal standard, respondents were on inquiry notice, because they also possessed information specifically suggesting the possibility that petitioners had made misstatements with scienter.

B. In order to answer the question presented and reverse the judgment below, the Court need only agree that the court of appeals erred by holding that a securities-fraud plaintiff is not on inquiry notice until he possesses information that the defendant acted with scienter. The Court, however, may also wish to address the broader issue of how the date on which a plaintiff is placed on inquiry notice affects the running of the statute of limitations. If it does, it should hold that, at least where, as here, the plaintiff fails to conduct a reasonably diligent investigation after being placed on inquiry notice of a potential violation, the limitations period begins to run from the date of inquiry notice.

There is substantial support for the position that the limitations period always begins to run from the date of inquiry notice, such that a plaintiff must conduct the inquiry contemplated by the doctrine of inquiry notice during the limitations period itself. That approach would be relatively straightforward in its application, because there will often be a particular event that unambiguously places a plaintiff on inquiry notice. The language of Section 1658(b), moreover, supports such an approach,

because the better view is that the phrase "facts constituting the violation" does not encompass the fact of scienter. And even if it did, a plaintiff who is on inquiry notice could be deemed, as a constructive matter, to have "discover[ed] * * * the facts constituting the violation," without possessing information specifically bearing on each and every element of the violation.

At most, when a securities-fraud plaintiff is on inquiry notice of his claim, the plaintiff should be entitled to an additional period of time before the limitations period commences only when he conducts a reasonably diligent investigation. That approach readily comports both with the language of Section 1658(b) and with this Court's discovery-rule jurisprudence, which makes clear that the discovery rule incorporates the equitable principle that a plaintiff must exercise due diligence in discovering the alleged violation. And it strikes a reasonable balance between defendants' interest in repose and plaintiffs' interest in remediation, because it creates appropriate incentives for plaintiffs to investigate potential claims upon being placed on inquiry notice.

Petitioners would prevail under the foregoing approach, because respondents have never argued, in response to petitioners' limitations defense, that they undertook *any* investigation after being placed on inquiry notice. Should the Court reach the broader issue concerning the running of the statute of limitations, therefore, it should hold that the limitations period began running in this case once respondents were on inquiry notice, and that their securities-fraud claim was therefore untimely.

ARGUMENT

THE COURT OF APPEALS ERRED BY HOLDING THAT RESPONDENTS' SECURITIES-FRAUD CLAIM WAS TIMELY UNDER 28 U.S.C. 1658(b)

A. Respondents Were On Inquiry Notice Of Their Securities-Fraud Claim More Than Two Years Before The Initial Version Of The Complaint Was Filed

1. The Limitations Period Of Section 1658(b) Is Triggered By Constructive, As Well As Actual, Discovery Of The "Facts Constituting The Violation"

a. Statutes of limitations "are found and approved in all systems of enlightened jurisprudence." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). Such statutes "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (internal quotation marks and citation omitted).

Ordinarily, the limitations period "begins to run[] at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty," even if "the plaintiff is unaware of the accrual of his or her cause of action." 2 Calvin W. Corman, *Limitation of Actions* § 11.1.1, at 134 (1991) (Corman). In some circumstances, however, the limitations period does not run from the date of accrual, but is instead subject to the "discovery rule": *viz.*, the rule that the limitations period begins to run when a plaintiff discovers, or should discover, facts that form the basis of the plaintiff's cause of action. That rule originated at equity, and this Court has long recognized its applicability to fraud claims. See, *e.g.*, *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348 (1875). Numerous federal statutes of limitations now expressly incorporate

the discovery rule in some form, and this Court has recognized that the discovery rule also applies in certain circumstances in which the relevant statute of limitations does not include one. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001) (citing cases).

b. This case concerns the limitations period for a private action under Section 10(b) of the Securities Exchange Act of 1934. That act contained no statute of limitations for private claims under Section 10(b), for the simple reason that it did not provide for private claims in the first place; the private cause of action under Section 10(b), famously, is a "judicial construct." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008).

Accordingly, in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), this Court undertook "the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed." *Id.* at 359. The Court noted that the 1934 Act contained a number of limitations provisions governing its express causes of action and that almost all of those provisions contained "some variation of a 1-year period after discovery combined with a 3-year period of repose." *Id.* at 359-360. Observing that those provisions "differ[ed] slightly in terminology," the Court ultimately selected, as the applicable limitations provision, the provision governing claims of market manipulation under Section 9 of the 1934 Act. *Id.* at 364 n.9. That provision requires that a plaintiff file suit "within one year after the discovery of the facts constituting the violation and within three years after such violation." 1934 Act § 9(e), 15 U.S.C. 78*i*(e).

In 2002, as part of the Corporate and Criminal Fraud Accountability Act, Pub. L. No. 107-204, 116 Stat. 800 (Sarbanes-Oxley Act), Congress for the first time ex-

pressly provided a statute of limitations for Section 10(b) claims. See 28 U.S.C. 1658(b). In so doing, Congress codified the limitations provision previously set out in Section 9(e) of the 1934 Act and adopted by this Court in *Lampf*, with only one modification: Congress extended the limitations and repose periods to two years and five years, respectively. See *ibid.*

c. The limitations period in Section 1658(b) runs from the date of "discovery of the facts constituting the violation." It is well established—and has never been disputed in this case—that the limitations period in Section 1658(b) is triggered not only by *actual* discovery of the "facts constituting the violation," but also by *constructive* discovery: *i.e.*, where the plaintiff should have known of the relevant facts at an earlier date than he actually did.

Because the discovery rule is fundamentally an equitable principle, the default understanding has always been that, when a statute of limitations either explicitly or implicitly incorporates the discovery rule, the limitations period begins to run from the date of either actual or constructive discovery. See, *e.g.*, *Kirby* v. *Lake Shore & Mich. S. R.R. Co.*, 120 U.S. 130, 138 (1887); *Wood*, 101 U.S. at 143; *Stearns* v. *Page*, 48 U.S. (7 How.) 819, 829 (1849). Congress acted against the backdrop of that default understanding when it enacted the various limitations provisions in the 1934 Act—including, most importantly, the limitations provision in Section 9(e), which served as the model for Section 1658(b). In the wake of *Lampf*, moreover, courts of appeals applying the Section 9(e) limitations provision in the context of Section 10(b) actions consistently held that the limitations period begins to run from the date of constructive, as well as actual, discovery, notwithstanding the absence of any express language in Section 9(e) to that effect. See, *e.g.*,

Great Rivers Coop. of S.E. Iowa v. *Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997); *Law* v. *Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir. 1997); *Howard* v. *Haddad*, 962 F.2d 328, 330 (4th Cir. 1992) (Powell, J.).

By leaving intact the relevant language from Section 9(e) in enacting Section 1658(b), Congress ratified the settled understanding that the language encompassed constructive discovery. See, *e.g.*, 148 Cong. Rec. 12,502 (2002) (statement of Sen. Leahy) (noting that Section 1658(b) would not "chang[e] the basic standards of the law," apart from lengthening the limitations period). The limitations period under Section 1658(b) thus begins to run once a plaintiff has either actually or constructively "discover[ed] the facts constituting the violation." The issues in this case center on the circumstances under which constructive discovery can be said to have occurred, such that the limitations period is triggered.

2. To Be On Inquiry Notice Of A Claim For Purposes Of The Discovery Rule In Section 1658(b), A Plaintiff Need Not Possess Information That The Defendant Acted With Scienter

The court of appeals held in this case that, for purposes of the discovery rule in Section 1658(b), a plaintiff in a private securities-fraud action is not on inquiry notice of his claim until the plaintiff possesses information that the defendant acted with scienter. Pet. App. 33a.[3]

[3] See *Alaska Elec. Pension Fund* v. *Pharmacia Corp.*, 554 F.3d 342, 348 (3d Cir. 2009) (confirming that the court of appeals' decision in this case stands for the proposition that "inquiry notice, in securities fraud suits, requires storm warnings indicating that defendants acted with scienter"), petition for cert. pending, No. 08-1315 (filed Apr. 22, 2009). That proposition, moreover, was at the heart of respondents' argument below. See, *e.g.*, Resp. C.A. Br. 31.

Assuming, *arguendo*, that scienter is one of the "facts constituting the violation" for purposes of Section 1658(b), but see pp. 41-42, *infra*, the court of appeals' holding was erroneous, and its error warrants reversal.

a. It is well established—and, again, has never been disputed in this case—that the discovery rule in Section 1658(b) incorporates the principle of inquiry notice. That principle is best understood as a refinement of the principle of constructive discovery, and it has deep roots in the application of the discovery rule to fraud claims more generally. See, *e.g.*, *Wood*, 101 U.S. at 141; *Burke* v. *Smith*, 83 U.S. (16 Wall.) 390, 401 (1873). In the wake of *Lampf*, those courts of appeals that addressed the issue had consistently held that the Section 9(e) limitations provision, as applied to Section 10(b) actions, incorporated not only the broader principle of constructive discovery, but also the principle of inquiry notice, see, *e.g.*, *Berry* v. *Valence Tech., Inc.*, 175 F.3d 699, 703-704 (9th Cir.) (citing cases), cert. denied, 528 U.S. 1019 (1999), and Congress ratified that understanding in enacting Section 1658(b), see, *e.g.*, S. Rep. No. 146, 107th Cong., 2d Sess. 29 (2002) (additional views of eight Senators).

As the name suggests, the basic premise underlying the doctrine of inquiry notice is that there comes a point at which a plaintiff possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry to confirm the existence of his claim: that is, where, "when judged objectively[,] the plaintiff should be on notice that further inquiry is needed." 2 Corman § 11.5.8, at 203. Rather than more generally determining when a hypothetical plaintiff should have discovered the facts giving rise to his claim, a court applying the doctrine of inquiry notice determines when there was sufficient information available to the plaintiff so as to trigger the duty to investigate fur-

ther. In the context of securities-fraud claims governed by Section 1658(b), the lower courts have held that a plaintiff is on inquiry notice when he receives so-called "storm warnings": *i.e.*, when there was sufficient information in the plaintiff's possession, or in the public domain, to cause a reasonable investor to suspect the possibility that the defendant has engaged in securities fraud. See, *e.g.*, *Benak* v. *Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 400 (3d Cir. 2006); *Sterlin* v. *Biomune Sys.*, 154 F.3d 1191, 1196 (10th Cir. 1998); *Jensen* v. *Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).[4]

b. It necessarily follows from the standard for inquiry notice that, in order to possess sufficient information to suspect the possibility that the defendant has engaged in wrongdoing, a plaintiff need not possess information specifically bearing on each and every element of the underlying violation. Indeed, this Court has already recognized that principle, if implicitly. In *TRW*, the Court considered whether to read the discovery rule into the then-applicable version of the statute of limitations for claims under the Fair Credit Reporting Act. See 534 U.S. at 22-23. The Court ultimately refused to do so. See *id.* at 33. Critically for present purposes, however, the Court acknowledged that, if the discovery rule had been applicable, a plaintiff could be on inquiry notice when the plaintiff had been denied credit but did not

[4] The Second Circuit has formulated the standard in terms of whether the plaintiff possessed sufficient information to suggest that it was *probable* that the defendant had engaged in securities fraud. See, *e.g.*, *Newman* v. *Warnaco Group, Inc.*, 335 F.3d 187, 193 (2d Cir. 2003). It is questionable, however, whether that slightly different formulation would lead to substantially different results in practice, and respondents do not contend otherwise. See Br. in Opp. 16 n.6.

possess information that a credit agency had made improper disclosures, unless the defendant had engaged in fraudulent concealment that would render discovery of the improper disclosures impossible (and, in the Court's view, would thus delay the running of the limitations period). See *id.* at 30-31. The Court therefore recognized that a plaintiff could be on inquiry notice without possessing information specifically relating to each element—even an essential element—of the violation.

That general rule is equally, if not more, applicable in this context. When a plaintiff has reason to believe that a defendant has made a material misstatement or omission in connection with the purchase or sale of a security, the plaintiff ordinarily should at least *suspect the possibility* that the defendant did so with scienter and therefore committed a violation of Section 10(b)—even if it is also possible that the misstatement is susceptible of an innocent explanation. That is particularly true because, as this Court has recognized, scienter in securities-fraud actions is usually proved through inferences from circumstantial evidence. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390 n.30 (1983). In many cases, when a plaintiff possesses information suggesting that the defendant has made a misstatement, the plaintiff will rely on the same information to support the inference that the defendant has made the misstatement intentionally or recklessly. See, *e.g.*, *Makor Rights & Issues Ltd.* v. *Tellabs Inc.*, 513 F.3d 702, 709 (7th Cir. 2008). Insofar as the two categories of information may not always be readily distinguishable, there is all the more reason to question the court of appeals' bright-line rule that a plaintiff who possesses information that the defendant made a misstatement can *never* be on inquiry notice until he also possesses discrete information specifically relating to scienter.

The court of appeals' rule is flawed for the additional reason that it would threaten to eliminate the principle of inquiry notice altogether. Under the court of appeals' rule, a plaintiff would not be on inquiry notice until he possesses information specifically relating to all of the elements of the violation, including scienter. A plaintiff who possesses such information, however, could at that point be said to have *discovered* his claim, even if he does not yet possess the facts to a sufficient level of detail to be able to file a complaint. See pp. 28-33, *infra*. Under the court of appeals' rule, therefore, the doctrine of inquiry notice would effectively do no work, because a plaintiff would not "ha[ve] * * * storm warnings until the hurricane makes landfall." *Betz* v. *Trainer Wortham & Co.*, 519 F.3d 863, 869 (9th Cir. 2008) (Kozinski, C.J., dissenting from denial of rehearing en banc), petition for cert. pending, No. 07-1489 (filed May 27, 2008).

c. Not only is there no logical basis for the court of appeals' rule, but there is also no support for it in the law. As a preliminary matter, at the time Congress enacted Section 1658(b), two courts of appeals had squarely held that a plaintiff need not possess information that the defendant acted with scienter in order to be on inquiry notice, see *Theoharous* v. *Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001); *Sterlin*, 154 F.3d at 1203, and numerous other courts of appeals had held that the limitations period for Section 10(b) actions incorporates the principle of inquiry notice without additionally requiring the plaintiff to possess information specifically relating to scienter, see *Berry*, 175 F.3d at 703-704 (citing cases). The only two circuits to have adopted the rule that a plaintiff must possess information specifically relating to scienter in order to be on inquiry notice—the Third Circuit in this case and the Ninth Circuit in *Trainer Wortham*—have done so only very recently, years after

Congress enacted Section 1658(b). It is therefore reasonable to assume that, while Congress ratified the doctrine of inquiry notice in enacting Section 1658(b), see p. 20, *supra*, it did not intend to adopt any more particular requirement that a plaintiff possess information relating to scienter in order to be on inquiry notice.

There is also no support for the court of appeals' rule in the considerable body of state law applying the doctrine of inquiry notice in the context of fraud claims. Although the law in some States with regard to fraud claims is not entirely clear, the great majority of the States apply discovery rules that incorporate the principle of inquiry notice; in many of those States, moreover, the limitations period is expressly triggered by discovery of the "facts constituting the fraud." See, *e.g.*, Cal. Civ. Proc. Code § 338(d) (West 2006); Mont. Code Ann. § 27-2-203 (2007); N.D. Cent. Code § 28-01-16(6) (2009).

In those States that apply the traditional discovery rule in some form, we are not aware of a single case in which a court has adopted the rule that a plaintiff in a fraud action is not on inquiry notice of his claim until he possesses information that the defendant acted with scienter.[5] To the contrary, some courts have expressly rejected the proposition that a plaintiff must possess information that the defendant acted with scienter in order to be on inquiry notice. See, *e.g.*, *Breitz* v. *Lykes-Pasco Packing Co.*, 561 So. 2d 1204, 1205 (Fla. Dist. Ct. App. 1990); *Stroh Die Casting Co.* v. *Monsanto Co.*, 502 N.W.2d 132, 143 n.18 (Wis. Ct. App. 1993). In addition,

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[5] The case that comes closest to imposing such a requirement is *City of Fairbanks* v. *Amoco Chemical Co.*, 952 P.2d 1173 (Alaska 1998). That case, however, involved a limitations period that was triggered only by *actual* discovery. *Id.* at 1178.

numerous other courts have implicitly rejected that proposition, by holding that a plaintiff was on inquiry notice without specifically identifying information relating to scienter. See, *e.g.*, *Blegen* v. *Monarch Life Ins. Co.*, 365 N.W.2d 356, 357 (Minn. Ct. App. 1985); *Wise* v. *Anderson*, 359 S.W.2d 876, 879 (Tex. 1962); *Hansen* v. *Stanley Martin Cos.*, 585 S.E.2d 567, 574-575 (Va. 2003).

d. The court of appeals' rule is similarly in tension with this Court's decisions concerning the discovery rule more generally. In those decisions, the Court has routinely adopted interpretations of the discovery rule that do not require a plaintiff to discover all of the elements of his claim before the limitations period begins running. For similar reasons, when the principle of inquiry notice is applicable, a plaintiff need not possess information specifically relating to each element of his claim to trigger the duty of further investigation.

In *Kubrick*, the plaintiff in a medical-malpractice action under the Federal Tort Claims Act (FTCA) argued that the limitations period should begin to run only once the plaintiff possessed (or should have possessed) knowledge that the prior medical treatment that had caused his injury was negligent. 444 U.S. at 116. The Court rejected that argument. *Id.* at 125. Although the Court did not explicitly advert to the principle of inquiry notice, it effectively framed its analysis in inquiry-notice terms. Specifically, the Court noted that, once a plaintiff had discovered the "critical facts" of his injury and the cause, the plaintiff "need only ask" in order to determine whether the treatment was negligent. *Id.* at 122. The Court added that "it does not appear that [the plaintiff] ever made any inquiry," *id.* at 123, and that "[t]o excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations

statute, which is to require the reasonably diligent presentation of tort claims against the Government," *ibid.*

Ultimately, the Court rejected not only a rule under which the limitations period would begin to run once "the plaintiff knew or could reasonably be expected to know of the Government's breach of duty," but also a more restrictive, inquiry-notice-style rule under which the period would begin to run once "the plaintiff had reason to suspect or was aware of facts that would have alerted a reasonable person to the possibility that a legal duty to him had been breached." *Kubrick*, 444 U.S. at 125. Just as information specifically relating to negligence is unnecessary for the limitations period for FTCA medical-malpractice claims to begin running, so too is information specifically relating to scienter unnecessary, when a securities-fraud plaintiff has notice of the "critical facts" underlying his claim, to put the plaintiff on inquiry notice.

In *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997), and *Rotella* v. *Wood*, 528 U.S. 549 (2000), the Court considered the limitations period for civil actions under the Racketeer Influenced and Corrupt Organizations Act (RICO). In *Klehr*, the Court rejected the position that the limitations period began to run only when the plaintiff knew, or should have known, of the last predicate act that was part of the pattern of racketeering activity. 521 U.S. at 186-191. The Court reasoned that such a rule "would permit plaintiffs who know of the defendant's pattern of [racketeering] activity simply to wait, sleeping on their rights, as the pattern continues and treble damages accumulate." *Id.* at 187 (internal quotation marks and citation omitted). And in *Rotella*, the Court rejected the position that the limitations period for civil RICO claims began to run only when the plaintiff discovered both the injury and the pattern of racketeering activity.

528 U.S. at 554. The Court reasoned that, while discovery of a pattern of racketeering activity may be complex, the same could have been said about the discovery of negligence in *Kubrick*, yet "its discovery is not required before the statute starts running." *Id.* at 556. Once again, just as a plaintiff need not know of certain elements of his claim for the limitations period for civil RICO claims to begin running, a plaintiff need not possess information specifically relating to scienter in order to be on inquiry notice of a Section 10(b) violation. Because the court of appeals' contrary rule cannot readily be reconciled with this Court's jurisprudence on the discovery rule, it should be rejected.

e. Notably, in an amicus brief in a companion case at the certiorari stage, the government made no effort to defend the bright-line rule that the court of appeals in this case adopted. Instead, the government contended that, in order to be on inquiry notice, a plaintiff need not possess information that the defendant acted with scienter when the alleged misstatement was "false for reasons likely to have been within the knowledge of the [defendant] when making it," but must possess such information when the alleged misstatement "concern[ed] information that is external to the [defendant]." U.S. Br. at 11-12, *Trainer Wortham & Co.* v. *Betz* (No. 07-1489) (internal quotation marks and citation omitted).

The government correctly recognized that there is no support for the court of appeals' bright-line rule, and the Court need only reject that rule in order to reverse the judgment below. In order to provide additional guidance to the lower courts, the Court may also wish to note that, when a plaintiff has reason to believe that a defendant has made a misstatement, the plaintiff ordinarily will be on inquiry notice, because he should at least suspect the

possibility that the defendant made the misstatement with scienter.

The government's formulation is seemingly consistent with that principle, because the mine run of alleged misstatements, as in this case, will presumably involve information that is "within the knowledge of" or "internal to" the defendant—and will therefore, under the government's formulation, put prospective plaintiffs on inquiry notice. But the government's formulation—which apparently originates from passing statements in a Seventh Circuit opinion, see *Law*, 113 F.3d at 785—may generate artificial and unnecessary complexities in operation, because it may not always be easy to determine whether a representation concerns information that is "internal" or "external" to the defendant (even if it is easy to do so in this case, see pp. 38-39, *infra*). And it is far from clear whether it would be appropriate to frame an inflexible rule under which a plaintiff can *never* be on inquiry notice absent information specifically relating to scienter when a statement concerns information that is "external" to the defendant. For those reasons, the Court need not embrace the government's alternative formulation here. Instead, the Court need only hold that the court of appeals erred by requiring the plaintiff to possess information specifically relating to scienter in order to be on inquiry notice.

3. To Trigger The Limitations Period In Section 1658(b), A Plaintiff Need Not Possess Sufficient Information To Survive A Motion To Dismiss

The implicit premise of the court of appeals' bright-line rule requiring information specifically relating to scienter for inquiry notice—and the explicit premise of the government's proposed rule requiring such information in at least some circumstances—is that, in order for discovery to occur for purposes of Section 1658(b), a

plaintiff must possess (or be deemed to possess) sufficient information to file a complaint that would survive a motion to dismiss. See U.S. Br. at 9, *Trainer Wortham*, *supra*. Whatever the exact meaning of Section 1658(b), see pp. 41-43, 46-47, *infra*, that premise is invalid.

a. To begin with, that premise simply cannot be reconciled with the language of Section 1658(b) itself. The limitations period in Section 1658(b) begins to run upon discovery of the "facts constituting the violation"—*i.e.*, the violation of Section 10(b)—and not upon discovery of all of the facts necessary to pursue a private cause of action. As this Court has recognized, the implied private cause of action under Section 10(b) contains certain additional elements beyond those required for a *violation* of that provision. See, *e.g.*, *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005) (listing elements). A plaintiff could therefore be on notice for purposes of Section 1658(b) even if he had not discovered information bearing on certain elements of his claim: for example, when the plaintiff had discovered information indicating that the defendant had made a misstatement, but had not yet determined that the misstatement had caused him to suffer a loss (and thus could not yet file a complaint). See 1934 Act § 21D(b)(4), 15 U.S.C. 78u-4(b)(4).

Significantly, the Securities and Exchange Commission (SEC) has taken the position that "[t]he date of a Rule 10b-5 'violation' need not coincide with the 'accrual' of a cause of action"; in a case involving an alleged misrepresentation, the SEC explained, "the 'violation' occur[s] when false statements [a]re made." SEC Br. at 21 n.30, *Lampf*, *supra* (No. 90-333). This Court appears to have accepted that understanding in *Lampf* itself, see 501 U.S. at 364 (concluding that the complaints at issue were untimely under the repose provision of Section 9(e) because they were filed "more than three years after pe-

titioner's alleged misrepresentations"), and even the Third Circuit has previously recognized that the term "violation" in Section 1658(b) refers to the defendant's misrepresentation, not to the accrual of a plaintiff's entire cause of action, see *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (2007).

A contrary rule would effectively require a court to engage in the difficult task of passing on the sufficiency of the allegations in the complaint before determining whether the complaint was untimely, because the natural starting point for the determination of whether a plaintiff could hypothetically have filed a complaint that would survive a motion to dismiss (thus triggering the limitations period) would be whether the plaintiff *did* in fact file a valid complaint. As a result, where a defendant wishes to raise both a limitations defense and a pleading defense, the defendant would be forced either to choose between the two defenses or to advance effectively inconsistent arguments. That rule cannot be the law, because it would "go far to eliminate the statute of limitations as a defense separate from" a pleading defense. *Kubrick*, 444 U.S. at 125. There is therefore no plausible basis for concluding that a plaintiff must be able to file a securities-fraud complaint before the limitations period can even start to run.

b. With regard to those elements that are required for a violation of Section 10(b), moreover, it is not necessary that the plaintiff possess sufficient information to satisfy any heightened pleading requirements applicable to those elements before the limitations period begins running. In the Private Securities Litigation Reform Act of 1995 (PSLRA)—enacted after this Court first set out the limitations period for Section 10(b) actions in *Lampf*—Congress adopted heightened pleading requirements for private securities-fraud actions, including

the requirement that the complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 1934 Act § 21D(b)(2), 15 U.S.C. 78u-4(b)(2).

In *Rotella*, this Court considered and rejected the argument that the existence of heightened pleading requirements should drive application of the discovery rule. Specifically, the Court rejected the plaintiff's contention that it should adopt a broader version of the discovery rule for civil RICO claims on the ground that, in many cases, those claims were subject to the heightened pleading requirement for fraud claims in Federal Rule of Civil Procedure 9(b). 528 U.S. at 560-561. While acknowledging the plaintiff's concern that a narrower rule could "allow[] blameless ignorance to defeat a claim," the Court concluded that "we simply do not think such a concern should control the decision about the basic limitations rule." *Id.* at 560 (internal quotation marks and citation omitted). Although the PSLRA operates differently in some respects from Rule 9(b), the basic point remains the same: under the discovery rule, the limitations period may be triggered even when a plaintiff will not possess sufficient information to satisfy any applicable heightened pleading requirements.

It is therefore true, at least as a theoretical matter, that, under Section 1658(b), a plaintiff may not be in a position to file a securities-fraud complaint that would survive a motion to dismiss before the limitations period runs. Even when the discovery rule is applicable, however, the purpose of the limitations period *itself* is to give the plaintiff a specified period of time in which to "prepare a case against [the] perpetrators"—not to sit on his complaint once it is ready. *Lampf*, 501 U.S. at 378 (Kennedy, J., dissenting); see, *e.g.*, *Fujisawa Pharm. Co.* v. *Kapoor*, 115 F.3d 1332, 1334 (7th Cir. 1997). As the gov-

ernment has previously explained in another case involving the discovery rule, "statutes of limitations are designed to induce prospective plaintiffs to investigate and act; they are not designed to offer a period of leisure between the completion of an investigation and the filing of suit." U.S. Br. at 13, *Kubrick*, *supra* (No. 78-1014). The possibility that a heightened pleading requirement "will exact some cost," insofar as some plaintiffs may be unable to prepare valid complaints within the limitations period, is thus an insufficient basis for adopting a broader interpretation of the discovery rule. *Rotella*, 528 U.S. at 560.

c. Significantly, in extending the limitations period for Section 10(b) claims from one year to two years in the Sarbanes-Oxley Act, Congress acted out of concern that the preexisting one-year period would foreclose plaintiffs who were unable to prepare complaints sufficient to satisfy the PSLRA's heightened pleading requirements in time. In its report, the Senate Judiciary Committee observed that "[t]he one year statute of limitations from the date the fraud is discovered is * * * particularly harsh on innocent defrauded investors," because "the complexities of how the fraud was executed often take well over a year to unravel, even after the fraud is discovered." S. Rep. No. 146, *supra*, at 9. Specifically, the committee noted that, "[w]ith the higher pleading standards that * * * govern securities fraud victims, it is unfair to expect victims to be able to negotiate such obstacles in the span of 12 months." *Ibid.* That concern would have been wholly misplaced if the one-year period did not begin to run until the plaintiff possessed enough information to satisfy the PSLRA's heightened pleading requirements in the first place.

Conversely, if the limitations period were triggered only once a plaintiff was able to bring suit, the practical

effect of Congress's adoption of heightened pleading requirements in the PSLRA would have been to postpone the start of the limitations period, sometimes significantly, in many cases. Given that the PSLRA's primary purpose was to "check * * * abusive litigation by private parties," *Tellabs Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), it is implausible that, in enacting the PSLRA, Congress would have wanted effectively to extend the time for filing private securities-fraud actions—and thus to enable more plaintiffs to use securities-fraud actions as a hedge against downside risk. See pp. 48-49, *infra*. In sum, the limitations period in Section 1658(b) is triggered by something short of the ability to file a viable complaint, and there is therefore no valid statutory basis for the court of appeals' rule that a plaintiff must possess information specifically relating to scienter in order to be on inquiry notice.

4. Under Any Standard, Respondents Were On Inquiry Notice Of Their Securities-Fraud Claim More Than Two Years Before The Initial Version Of The Complaint Was Filed

a. Should the Court agree that a plaintiff is not required to possess information specifically relating to scienter to be on inquiry notice, "it is clear," as the district court concluded in applying the correct legal standard, that respondents were on inquiry notice of their claim more than two years before the initial version of the complaint was filed. Pet. App. 97a.

As the district court explained at length, there was an "overwhelming collection of information * * * in the public realm" by no later than October 9, 2001, suggesting the possibility that petitioners had engaged in securities fraud in connection with their statements concerning

Vioxx. Pet. App. 85a.[6] Most importantly, FDA—the primary regulatory agency overseeing Merck's representations regarding Vioxx—had issued a warning letter charging Merck with "engag[ing] in a promotional campaign for Vioxx that minimizes the potentially serious cardiovascular findings that were observed in the [VIGOR] study, and thus, misrepresents the safety profile for Vioxx." J.A. 340. In addition, there was an enormous volume of news stories, academic articles, and analyst reports debating the merits of (and, in many instances, casting doubt on) Merck's position that the "likely" explanation for the disparity in cardiovascular events was that naproxen prevented blood clots. See, *e.g.*, J.A. 319-338, 355-507. And there were numerous pending lawsuits, particularly in the wake of the FDA warning letter, that specifically accused Merck of making misstatements concerning the cardiovascular risks associated with Vioxx. See J.A. 868-958. Overall, as the

[6] The question whether respondents were on inquiry notice of their securities-fraud claim is conceptually distinct from the question whether respondents will ultimately prevail on the merits of that claim—and, for that reason, it is entirely consistent for petitioners to contend that respondents were on inquiry notice, on the one hand, but to maintain that Merck did not commit securities fraud, on the other. The former question focuses on what information was in respondents' possession, or in the public domain, that would have *suggested the possibility* that petitioners had engaged in securities fraud, regardless whether petitioners in fact did. And as to the latter question, Merck vigorously denies that it made misrepresentations concerning Vioxx's safety profile, and, in particular, has consistently expressed its strong disagreement with many of the allegations in the FDA warning letter. Notably, the SEC's Division of Enforcement recently informed Merck that it does not intend to recommend any enforcement action regarding Merck's statements concerning Vioxx. See Merck & Co., Inc., Quarterly Report (Form 10-Q), at 26 (Aug. 3, 2009).

district court noted, "the torrent of publicity" concerning Vioxx was "more akin to thunder, lightning and pouring rain than subtle warnings of a coming storm." Pet. App. 94a.[7]

To the extent that the court of appeals attempted to cast doubt on the relevance of the various sources of information on which the district court relied, its reasoning was patently flawed. With regard to the FDA warning letter, the court reasoned that "FDA was acting as a regulator of drug advertising, rather than as a regulator of the securities markets." Pet. App. 42a. That is true, but it does not follow that the widely publicized FDA warning letter—with its explicit accusation that Merck had "misrepresent[ed] the safety profile for Vioxx"—should be discounted for purposes of the inquiry-notice analysis simply because it was not issued by the SEC (and did not specifically accuse Merck of *securities* fraud). With regard to the filing of other lawsuits, the court of appeals similarly reasoned that "none of th[o]se lawsuits alleged securities fraud." *Id.* at 45a. That is also true, but it does not follow that the lawsuits—which accused Merck of making public misrepresentations concerning Vioxx's safety profile, and were therefore premised on the same underlying factual allegations—should be discounted simply because they did not assert the same cause of action. See, *e.g.*, *Masters* v. *GlaxoSmithKline*, 271 Fed. Appx. 46, 49 (2d Cir. 2008). Under the correct legal standard, respondents were plainly on in-

[7] As the information in question came into the public domain, it was reflected in Merck's stock price, which dropped substantially over the course of 2001 (and precipitously in the immediate aftermath of the FDA warning letter). See J.A. 826-832.

quiry notice of their claim more than two years before the initial complaint was filed.

b. In any event, respondents possessed not only information suggesting the possibility that petitioners made material misstatements, but also information specifically suggesting the possibility that they did so with scienter—and, for that reason, respondents were on inquiry notice more than two years before the initial complaint even under the court of appeals' standard.

As noted above, the FDA warning letter charged Merck with "minimiz[ing] the potentially serious cardiovascular findings that were observed in the [VIGOR] study, and thus, misrepresents the safety profile for Vioxx." J.A. 340. Those charges of deliberate wrongdoing—again, made publicly by the primary regulatory agency overseeing Merck's representations regarding Vioxx—would have sufficed to make a reasonable investor at least suspect the possibility that the alleged misstatements had been intentionally or recklessly made.[8]

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[8] At the certiorari stage, respondents suggested that this case should be analyzed differently because they had alleged not misstatements of fact, but rather misstatements of opinion or belief: *i.e.*, that Merck had expressed its *belief* that the likely explanation for the disparity in cardiovascular events was that naproxen prevented blood clots. See, *e.g.*, Br. in Opp. 29-31. Over the course of this litigation, respondents have taken seemingly inconsistent positions as to whether the alleged misstatements were statements of opinion, perhaps because misstatements of opinion are actionable only in limited circumstances. See, *e.g.*, Resp. D. Ct. Mem. of Law in Opp. to Mot. to Dis. 33 (filed Mar. 15, 2006). Assuming, however, that the alleged misstatements are better characterized as statements of opinion, the relevant inquiry under the court of appeals' standard would be whether the opinion at issue was "h[e]ld * * * in earnest." Pet. App. 33a. To the extent that FDA accused Merck of "misrepresent[ing] the safety profile for Vioxx," it would at a

Similarly, in the pending lawsuits, the plaintiffs alleged that Merck had, *inter alia*, "omitted, suppressed, or concealed material facts concerning the dangers and risks associated with Vioxx" and "*purposefully* downplayed and/or understated the serious nature of the risks associated with Vioxx." J.A. 893 (emphasis added). Those allegations, too, suggested the possibility that petitioners acted with scienter, and thus put respondents on inquiry notice even under the court of appeals' standard.

Notably, at least at earlier stages of the litigation, the plaintiffs in this case seem to have acknowledged as much—and thus to have pleaded themselves out of court. Prior versions of the complaint alleged that the FDA warning letter "put [petitioners] on notice * * * that [petitioners'] public statements concerning the safety of VIOXX were false and misleading." *E.g.*, J.A. 266 (Second Amended Complaint). Moreover, those versions of the complaint affirmatively cited both the FDA warning letter and the pending lawsuits as evidence of scienter, in a section of the complaint entitled "Additional Scienter Allegations." See, *e.g.*, J.A. 265, 266, 267. Although respondents conveniently omitted those allegations from the operative version of the complaint, they can hardly complain if the Court holds them to the earlier characterization of the warning letter and the pending lawsuits, and concludes, based on that characterization, that respondents possessed information specifically suggesting the possibility that petitioners acted with scienter as of the relevant date.[9]

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minimum suggest the possibility that any opinion expressed by Merck concerning Vioxx's safety profile was not sincerely held.

[9] Moreover, insofar as respondents contend that they were not on inquiry notice before November 6, 2001, because they did not pos-

c. Finally, respondents were also on inquiry notice more than two years before the initial complaint under the government's proposed standard, pursuant to which it is unnecessary for the plaintiff to possess any information specifically relating to scienter as long as the alleged misstatements involved information that is "within the knowledge of," or "internal to," the defendant. U.S. Br. at 11-12, *Trainer Wortham*, *supra*.

By respondents' own admission, "[t]he gravamen of [their] [c]omplaint was that [petitioners] made false statements of opinion by asserting that they believed that the results of the large-scale [VIGOR] clinical trial * * * were attributable to alleged cardioprotective properties of naproxen." Br. in Opp. 5. There can be no question but that Merck's alleged misstatements concerning the results of the VIGOR study involved information "within the knowledge of," or "internal to," Merck itself, because it was Merck that conducted the study. Indeed, the March 27, 2000, press release, on which respondents so heavily focus in their complaint, was issued even before the results of the study were publicly released. See J.A. 291-294. And the government's standard is even more clearly satisfied to the extent that the alleged misstatements are properly characterized, as respondents have suggested, as statements of Merck's own opinion or belief. See p. 36 n.8, *supra*. Under the

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sess any information specifically relating to scienter as of that date, they have failed to identify any such information that came into their possession *after* November 6, 2001, but before November 6, 2003—the date on which the first action asserting a securities-fraud claim was filed. See J.A. 265-269. The apparent implication of respondents' theory, therefore, is that respondents were not on inquiry notice even as of the date on which the initial version of the complaint was filed.

government's standard—or, for that matter, under any other standard—respondents were on inquiry notice more than two years before the initial complaint was filed.

B. Because Respondents Were On Inquiry Notice Of Their Securities-Fraud Claim More Than Two Years Before The Initial Complaint, Yet Failed To Conduct A Reasonably Diligent Investigation, Their Claim Was Untimely

The question presented in the petition for certiorari focused on whether the court of appeals erred by holding that a securities-fraud plaintiff is not on inquiry notice until he possesses information that the defendant acted with scienter. See Pet. i. The Court need only address that issue in order to dispose of this case. However, because there is a circuit conflict on the broader issue of how the date on which a plaintiff is on inquiry notice affects the running of the statute of limitations, see Pet. 20, the Court may wish to address that issue as well. If it does, it should hold that, at least where, as here, the plaintiff fails to conduct a reasonably diligent investigation after being placed on inquiry notice of a Section 10(b) violation, the limitations period begins to run from the date of inquiry notice.

1. a. The courts of appeals have taken conflicting positions as to when the limitations period begins running for a plaintiff who is on inquiry notice. Some courts have categorically held that the limitations period begins to run from the date of inquiry notice, however that date is defined. See Pet. 20-21 (citing cases). That approach is consistent with the manner in which the principle of inquiry notice has traditionally operated. As this Court has explained, "[w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry

might have led." *Wood*, 101 U.S. at 141 (quoting *Kennedy* v. *Green*, 3 Myl. & K. 699, 722, 40 Eng. Rep. 266, 275 (Ch. 1834) (opinion of Lord Brougham)). Accordingly, in numerous States, the limitations period for fraud claims runs from the date of inquiry notice (though the limitations period itself is sometimes subject to equitable tolling or estoppel). See, *e.g.*, *Jones* v. *Kassouf & Co., P.C.*, 949 So. 2d 136, 140 (Ala. 2006); *Holman* v. *Hansen*, 773 P.2d 1200, 1203 (Mont. 1989); *Association of Commonwealth Claimants* v. *Moylan*, 517 N.W.2d 94, 102 (Neb. 1994).[10]

Such a categorical approach—under which the date on which the plaintiff was on inquiry notice would always trigger the running of the limitations period—is also consistent with the manner in which statutes of limitations operate more generally. As discussed above, even when the applicable limitations period is subject to the discovery rule rather than the ordinary accrual rule, the purpose of the limitations period itself is to give the plaintiff time to complete the investigation of his claim. See pp. 31-32, *supra*. For that reason, no inequity would result from requiring the plaintiff to conduct the inquiry contemplated by the doctrine of inquiry notice during that period, and foreclosing the plaintiff from filing suit when he fails to complete that inquiry before the period runs. A categorical approach would also be relatively straightforward in its application, because there will of-

[10] Some courts considering the limitations period for fraud claims have suggested that a plaintiff is not on inquiry notice *in the first place* if a reasonably diligent investigation would not have turned up the remaining information necessary to fill in any missing element. Such an approach would be roughly equivalent to the broader approach discussed below, and it should be rejected in this context for the same reasons. See pp. 48-51, *infra*.

ten be a particular event that unambiguously places a plaintiff on inquiry notice—and therefore, under that approach, triggers the limitations period. Cf. Pet. App. 86a (noting that, in this case, the FDA warning letter "arguably * * * alone [was] sufficient to put [respondents] on inquiry notice of their claims against Merck").

b. In its recent amicus brief, the government contended that, insofar as a plaintiff could be on inquiry notice without possessing information specifically relating to scienter, such a categorical approach would be inconsistent with the text of Section 1658(b). See U.S. Br. at 10, *Trainer Wortham*, *supra*. That contention lacks merit.

To begin with, the better view is that the phrase "facts constituting the violation" in Section 1658(b) does not encompass the fact of scienter in the first place. Although scienter is an element of a violation of Section 10(b), the phrase "facts constituting the violation" is properly understood to reach only the core nucleus of facts concerning the defendant's *conduct*, separate and apart from the fact of the defendant's *state of mind*. See generally 2 Corman § 11.5.7, at 202 (noting that, under the discovery rule, "[a]ccrual of the plaintiff's cause of action does not depend on his or her acquisition of information in proof of scienter").[11] Indeed, that appears to have been how this Court used a materially identical phrase in *Tellabs*, when it noted, in summarizing the PSLRA's heightened pleading requirements, that the PSLRA "require[d] plaintiffs to state with particularity

[11] In at least one State in which the limitations period for fraud claims is triggered by discovery of the "facts constituting the fraud," that phrase has expressly been construed to exclude the fact of scienter. See *Stroh Die Casting*, 502 N.W.2d at 143 n.18.

both the facts constituting the alleged violation[] *and* the facts evidencing scienter." 551 U.S. at 313 (emphases added); cf. Fed. R. Civ. P. 9(b) (providing that "a party must state with particularity the circumstances constituting fraud" but that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally"). Insofar as the phrase "facts constituting the violation" does not reach the fact of scienter, it would necessarily follow that a plaintiff could discover the relevant facts for purposes of Section 1658(b) without possessing information specifically relating to scienter.

Even if the phrase "facts constituting the violation" were construed to mean facts bearing on all of the elements of the violation, however, such a categorical approach would still not be irreconcilable with the text of Section 1658(b), as the government has suggested. To the contrary, under that approach, a plaintiff who is on inquiry notice could be deemed, as a constructive matter, to have "discover[ed] * * * the facts constituting the violation," even if he does not possess information specifically bearing on each and every element of the violation. When a plaintiff suspects a violation, the plaintiff would have imputed knowledge of the "facts constituting the violation"; the plaintiff would then have the duration of the limitations period to complete an investigation and obtain the remaining information necessary to fill in any missing element and file suit. See, *e.g.*, *Norgart* v. *Upjohn Co.*, 981 P.2d 79, 88 (Cal. 1999) (explaining that a plaintiff "discovers the cause of action when he at least suspects a factual basis * * * for its elements" and that, "within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place"). A categorical approach is therefore consistent not only with a substantial body of case law on the doctrine of inquiry notice, but

also with the language of Section 1658(b). And petitioners would prevail under that approach, because respondents were on inquiry notice by no later than October 9, 2001—more than two years before the initial version of the complaint was filed. See pp. 33-39, *supra*.

2. At most, when a securities-fraud plaintiff is on inquiry notice of his claim, the plaintiff should be entitled to an additional period of time before the limitations period commences only when he conducts a reasonably diligent investigation. That is essentially the approach previously taken by the court of appeals below, and the approach long taken by the Second Circuit—the circuit with the most experience in considering securities-fraud claims. See Pet. 22 n.8 (citing cases).

a. An approach that gives the plaintiff the benefit of additional time only when he actually conducts an investigation follows naturally from this Court's jurisprudence concerning the discovery rule. As discussed above (see p. 16), the discovery rule originated in equity, and it therefore "inherent[ly]" incorporates the equitable principle that a plaintiff must exercise due diligence in discovering the violation—and that, when a plaintiff sleeps on his rights and "fail[s] to make inquiry," he is not entitled to the benefit of the rule. *United States* v. *Diamond Coal & Coke Co.*, 255 U.S. 323, 333 (1921). Accordingly, in its cases discussing the operation of the discovery rule, this Court has repeatedly emphasized the need for the plaintiff to have acted with reasonable diligence in prosecuting the investigation. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946); *Wood*, 101 U.S. at 141, 143; *Bailey*, 88 U.S. (21 Wall.) at 348, 349-350.[12]

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[12] Lower courts, too, have long required plaintiffs to show that "their failure to make the discovery sooner was not due to their own

Under the approach of the Second and Third Circuits, once a plaintiff is on inquiry notice, the limitations period will begin to run unless the plaintiff conducts a further inquiry of his own.[13] That approach strikes a reasonable balance between defendants' interest in repose, on the one hand, and plaintiffs' interest in remediation, on the other. In particular, it creates appropriate incentives for plaintiffs to conduct a prompt investigation of potential claims at the point of inquiry notice.

This Court has recognized the need for similar incentives in the context of civil RICO claims, in which the Court has held that a plaintiff must act with reasonable diligence in order to invoke the doctrine of fraudulent concealment. See *Klehr*, 521 U.S. at 193-196. In so holding, the Court noted that "private civil [RICO] actions

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lack of diligence." *Del Campo* v. *Camarillo*, 98 P. 1049, 1054 (Cal. 1908); see, *e.g.*, *Teall* v. *Slaven*, 40 F. 774, 778 (C.C.D. Cal. 1889); *Andrews* v. *Dole*, 1 F. Cas. 878, 884 (D.N.J. 1875).

[13] To be sure, the Second Circuit has sometimes stated that the relevant question is whether the plaintiff conducted *any* inquiry—thus raising the possibility that the plaintiff who conducts any inquiry is entitled to the benefit of the additional time that it would have taken for a *reasonably diligent* plaintiff to obtain the necessary additional information. See, *e.g.*, *LC Capital Partners, LP* v. *Frontier Ins. Group, Inc.*, 318 F.3d 148, 154 (2d Cir. 2003). The question is more appropriately framed in terms of whether *the plaintiff* conducted a reasonably diligent inquiry. Indeed, in applying the Second Circuit's rule, some district courts appear to have interpreted it in precisely that fashion. See, *e.g.*, *Addeo* v. *Braver*, 956 F. Supp. 443, 449 (S.D.N.Y. 1997) (Sotomayor, J.). Those courts were correct to do so, because it would contravene the fundamental equitable principles underlying the discovery rule if a plaintiff who conducts a patently insufficient inquiry (*e.g.*, by simply watching the Today show every morning to see whether there have been any further developments concerning Vioxx) were entitled to the benefit of what a more diligent inquiry would have uncovered.

seek not only to compensate victims but also to encourage those victims themselves diligently to investigate and thereby to uncover unlawful activity." *Id.* at 195. That rationale applies with equal (if not greater) force here, because the implied private right of action under Section 10(b), like the express private right of action under RICO, is designed to "supplement Government efforts to deter and penalize the respectively prohibited practices"—"an object pursued the sooner the better." *Rotella*, 528 U.S. at 557, 558.[14]

Moreover, the Second and Third Circuits' approach would impose minimal burdens on plaintiffs, because the reality of modern securities-fraud litigation is that there is a sophisticated plaintiffs' bar with the ability to conduct even the most complex investigations—and, to the extent that it takes cases on a contingent-fee basis, with every incentive to do so. Indeed, before the district court, counsel for respondents candidly conceded as much, while at the same time admitting that neither respondents nor their counsel had conducted an investigation in this case. See J.A. 999 (statement of Melvyn Weiss, counsel for respondents) (noting that "I think you have to take judicial notice of the fact that the plaintiffs' bar in the securities area is not asleep at the switch"); p. 48, *infra*. When counsel for a plaintiff conducts a rea-

[14] Even in cases in which private plaintiffs would be time-barred, the SEC ordinarily retains the authority to pursue enforcement actions—which, unlike private actions, are expressly authorized by the 1934 Act. See 1934 Act § 21(d), 15 U.S.C. 78u(d). There is no limitations period for SEC enforcement actions in which the SEC seeks only injunctive relief; a five-year limitations period, triggered by accrual, applies when the SEC seeks civil fines or penalties. See 28 U.S.C. 2462. Notably, in this case, the SEC has to date refused to take any enforcement action. See p. 34 n.6, *supra*.

sonably diligent investigation on the plaintiff's behalf, the plaintiff may be credited with the additional time that it took to conduct that investigation before the limitations period even begins to run.

b. In its recent amicus brief, the government contended that the Second and Third Circuit's approach, like a more categorical approach, would be inconsistent with the text of Section 1658(b). See U.S. Br. at 15, *Trainer Wortham*, *supra*. That contention lacks merit.

As a threshold matter, the Second Circuit's rule requiring a plaintiff to conduct an investigation in order to forestall the running of the limitations period was well established by the time Congress enacted Section 1658(b); indeed, in the legislative history, several Senators cited that rule with approval. See S. Rep. No. 146, *supra*, at 29 (additional views of eight Senators). Because Section 1658(b) was not intended to "chang[e] the basic standards of the law" with regard to the running of the limitations period, 148 Cong. Rec. 12,502 (2002) (statement of Sen. Leahy), there is no reason to believe that, by enacting Section 1658(b), Congress intended somehow to abrogate that rule.

More broadly, the Second and Third Circuits' approach readily comports with the language of Section 1658(b) itself. That approach could be understood to work in one of two functionally equivalent ways: (1) as extending the discovery period when a plaintiff conducts a reasonably diligent investigation, or (2) as starting the limitations period from the date of inquiry notice and providing for equitable tolling for the duration of a reasonably diligent investigation. As discussed above (see p. 43), the former understanding better comports with this Court's jurisprudence concerning the discovery rule, because the discovery rule itself "incorporates equitable considerations," including the principle that a plaintiff

must conduct a diligent inquiry in order to invoke the benefit of the rule. U.S. Br. at 28, *United States* v. *Beggerly*, 524 U.S. 38 (1998) (No. 97-731). Because the discovery rule already accommodates a plaintiff's diligence, there is no need to overlay a discrete doctrine of equitable tolling. Indeed, that appears to have been how this Court understood the limitations provision it adopted in *Lampf*, when it stated that the fact that the limitations period began running upon discovery of the facts constituting the violation "ma[de] tolling unnecessary." 501 U.S. at 363; see, *e.g.*, *TRW*, 534 U.S. at 30-31; *Beggerly*, 524 U.S. at 48.

Under the foregoing understanding of the Second and Third Circuits' approach, when a plaintiff conducts a reasonably diligent investigation and obtains the additional information necessary to fill in any missing element, he can be said at that point to have "discover[ed] * * * the facts constituting the violation." Conversely, when a plaintiff fails to conduct a reasonably diligent investigation, he can be deemed, as an equitable matter, to have "discovered" the relevant facts as of the date of inquiry notice. That approach therefore comfortably comports both with the language of Section 1658(b) and with the background understanding of the discovery rule. Should the Court reach the broader issue of how the date on which a plaintiff is on inquiry notice affects the running of the statute of limitations, it should at a minimum adopt that approach here.[15]

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[15] Insofar as the Court conceives of the Second and Third Circuits' approach as starting the limitations period from the date of inquiry notice and providing for equitable tolling for the duration of a reasonably diligent investigation, see, *e.g.*, *Rotella*, 528 U.S. at 561 (suggesting that equitable tolling could be available even when the the discovery rule is applicable), that approach can still be readily

Under the Second and Third Circuits' approach, just as under a more categorical approach, petitioners would prevail in this case. Notwithstanding the Third Circuit's prior adoption of that approach, respondents have never argued, in response to petitioners' limitations defense, that they undertook *any* investigation, much less a reasonably diligent investigation, in the wake of the events that placed them on inquiry notice. See, *e.g.*, Pet. App. 58a, 98a; cf. J.A. 994 (statement of Melvyn Weiss) (conceding, in response to the district court's question as to whether "you" or "your client" conducted an investigation, that "we didn't do it ourselves").

3. Some courts of appeals have held that, when a securities-fraud plaintiff is on inquiry notice of his claim, the plaintiff should be entitled to the additional period of time that it would take to complete a reasonably diligent investigation, regardless whether he actually conducted an investigation himself. See, *e.g.*, *Trainer Wortham*, 519 F.3d at 876. That approach should be rejected for three principal reasons.

a. Most fundamentally, when compared to the Second and Third Circuits' approach, the broader approach would effectively excuse a plaintiff's failure to conduct a further investigation after being placed on inquiry notice of a Section 10(b) violation, in contravention of basic equitable principles. Such an "ostrich" plaintiff would be in the same position as a plaintiff who does conduct a reasonably diligent investigation, because the limitations period would run from the same date: *i.e.*, from the con-

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reconciled with the language of Section 1658(b), because a plaintiff can constructively be deemed to have "discover[ed] * * * the facts constituting the violation" once he is on inquiry notice. See pp. 42-43, *supra*.

clusion of the reasonably diligent investigation (or, in the case of the "ostrich" plaintiff, a hypothetical reasonably diligent investigation). See *Fujisawa*, 115 F.3d at 1337. In a case involving a publicly traded company, the broader approach, when compared to the Second and Third Circuit's approach, would give the "ostrich" plaintiff more time to wait and "see how the price of his stock behave[s] in the interim," *ibid.*—and, if the price of the stock drops, to use a securities-fraud claim as a "partial downside insurance policy," *Dura*, 544 U.S. at 348. The broader approach would therefore "magnif[y]" "the opportunistic use of federal securities law to protect investors against market risk." *Tregenza* v. *Great Am. Commc'ns Co.*, 12 F.3d 717, 722 (7th Cir. 1993), cert. denied, 511 U.S. 1085 (1994).

Indeed, this case is a prime example of that phenomenon. Notwithstanding the information that was in the public domain as of October 9, 2001, the initial version of the complaint was not filed until November 6, 2003—by which time *more than two hundred* Vioxx-related lawsuits asserting other types of claims had already been filed. That filing date, moreover, was hardly coincidental. The initial complaint was filed shortly after Merck reported that its earnings would be lower than expected, in part because of falling sales of Vioxx due to widespread concerns about possible cardiovascular risks. See Pet. App. 18a. Unsurprisingly, that report caused Merck's stock price to drop considerably. See J.A. 848-849. The delay in bringing suit therefore allowed the plaintiffs to claim a bigger decline in Merck's stock price, and also enabled them to expand the size of their putative class—and thus exponentially multiplied the potential total value of the claims to the plaintiffs (and also, presumably, to their lawyers). See J.A. 999 (statement of Melvyn Weiss) (noting that "the earnings had materi-

ally dropped and that's what * * * securities lawyers look at").[16] A liberal approach to the running of the limitations period would facilitate the Topsy-like growth of plaintiffs' claims in cases such as this one, and thereby greatly increase the settlement value of those claims—and thus intensify the familiar pressures on defendants to settle securities-fraud claims regardless of their merit. See *Stoneridge*, 128 S. Ct. at 772.

b. In addition, the broader approach would lead to potentially grave difficulties in application, because it would force courts to engage in entirely hypothetical inquiries about what a reasonably diligent investigation would have entailed and how long it would have taken for such an investigation to bear fruit. By contrast, an approach that turned on the investigation the plaintiff actually conducted would require a court only to make the more focused determination whether *the particular plaintiff* acted with due diligence—a familiar task for courts in various areas of the law. See, *e.g.*, *District Att'y's Office for the Third Judicial Dist.* v. *Osborne*, 129 S. Ct. 2308, 2317 (2009) (noting that, under an applicable statutory provision, a convict could raise a claim based on newly discovered evidence only if it was "pursued with due diligence"). And an approach that turned entirely on the date of inquiry notice would be easier still to administer. See pp. 40-41, *supra*.

[16] Indeed, in the operative version of the complaint—filed more than eighteen months later—respondents expanded their claims still further: specifically, by suggesting that they were entitled to recovery for the sizable additional stock-price drop that occurred after Vioxx was withdrawn from the market in 2004, and extending the class to include even persons who purchased Merck stock after Vioxx's withdrawal. See J.A. 24-28.

c. Finally, the broader approach would seemingly render the principle of inquiry notice irrelevant. Under that approach, it would be unnecessary for a court to engage in the threshold inquiry as to when the plaintiff was on inquiry notice, because the ultimate inquiry would be when a hypothetical plaintiff should have obtained sufficient information fully to "discover" the violation—regardless whether the plaintiff had earlier possessed information that should have led him to suspect the possibility of a violation in the first place.

There is no valid justification for effectively abrogating the principle of inquiry notice in that manner. As discussed above (see p. 20), the inquiry-notice principle is deeply rooted in the application of the discovery rule to fraud claims, has been accepted by all of the courts of appeals to have addressed the issue, and was ratified by Congress when it enacted Section 1658(b). An approach that takes the date of inquiry notice at least as the starting point sets an appropriate balance for private securities-fraud plaintiffs, so that they are not penalized for their lack of knowledge of a violation, on the one hand, but not rewarded for their failure to investigate a suspected violation, on the other. Should the Court reach the broader issue concerning the running of the statute of limitations, therefore, it should reject any more forgiving, and potentially open-ended, alternative approach.

* * * * *

At the end of the analysis, it bears remembering that this case involves an implied right of action for which Congress has never explicitly provided, even as it established a statute of limitations to govern claims brought by private parties. That fact counsels restraint in the interpretation of both substantive and procedural requirements governing private securities-fraud actions.

See, *e.g.*, *Stoneridge*, 128 S. Ct. at 773. If Congress wishes to liberalize any aspect of the statute of limitations for private securities-fraud claims, it can readily do so—as, indeed, it recently did by extending the limitations period from one year to two. For its part, however, this Court should exercise caution and leave "[t]he decision to extend the cause of action * * * for Congress." *Ibid.* The court of appeals' interpretation of the statute of limitations for private securities-fraud actions is unduly expansive and wrong. That interpretation should be rejected, and the judgment below reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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