No. 08-905

IN THE

Supreme Court of the United States

MERCK & CO., INC., *et al.*,
Petitioners,

v.

RICHARD REYNOLDS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE PHARMACEUTICAL AND RESEARCH MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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August 17, 2009

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INTEREST OF *AMICUS CURIAE*

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies.[1] PhRMA's members are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. New medicines account for 40 percent of the lifespan increase between 1986 and 2000, see Frank R. Lichtenberg, Nat'l Bureau of Econ. Research, Working Paper No. 9754, *The Impact of New Drug Launches on Longevity: Evidence From Longitudinal, Disease-Level Data From 52 Countries, 1982-2001*, at 21 (2003), and member companies are the source of a majority of all new medicines that have been discovered and marketed. PhRMA's members have invested approximately $300 billion in the last decade to develop new medicines – including over $50 billion last year alone. See PhRMA, *Pharmaceutical Industry Profile 2009*, at 32 (2009) ("Industry Profile"), *at* http://www.phrma.org/files/PhRMA2009 ProfileFINAL.pdf.

PhRMA members closely monitor legal issues that affect the industry, and PhRMA has frequently participated in cases before this Court raising such issues. See, *e.g.*, Brief for PhRMA and BIO as *Amici Curiae* Supporting Petitioner, *Wyeth* v. *Levine*, 129 S.

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[1] Each party has consented to the filing of this brief, and the parties' letters of consent have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. A list of PhRMA's members is available at http://www.phrma.org.

Ct. 1187 (2009) (No. 06-1249); Brief for the Pharmaceutical Research and Manufacturers of America as *Amicus Curiae* Supporting Petitioners, *Warner-Lambert Co.* v. *Kent*, 128 S. Ct. 1168 (2008) (No. 06-1498); Brief of *Amicus Curiae* Pharmaceutical Research and Manufacturers of America in Support of Respondent, *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006) (No. 05-130).

The issue in this case is especially significant to PhRMA members because a number of them have borne the expense and burden of defending against securities-fraud class actions in recent years. In 2007 and 2008, for example, almost 50 such actions were filed against pharmaceutical and biotechnology companies. David A. Kotler, *Dechert Survey of Securities Fraud Class Actions Brought Against Life Sciences Companies* 2 (Apr. 2009) ("2009 Survey"), *at* http://www.dechert.com/library/Survey_of_Securities_Fraud_CA_4-09.pdf. Moreover, as explained in greater detail below, the nature of the industry makes pharmaceutical companies particularly likely to continue to be targets of securities-fraud strike suits in the future. These suits, which are often filed for their nuisance value, raise the already substantial costs and risks associated with the development of new medicines. Consequently, the approach taken by the Third Circuit, which makes it even more difficult for defendants to secure prompt dismissal of untimely nuisance claims at the pleadings stage, is of serious concern to PhRMA members.

SUMMARY OF ARGUMENT

1. The two-year statute of limitations set forth in 28 U.S.C. § 1658(b) should be construed to provide the certainty and predictability that this Court has repeatedly sought in securities-fraud litigation.

Recognizing the potential for abuse of securities-fraud class actions, this Court has rejected rules of liability that turn on fact-bound determinations and that offer little practical guidance. The need for certainty and predictability animated the Court's decision to adopt a uniform statute of limitations in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), and these concerns apply equally to the interpretation of the limitations period later codified by Congress. The limitations defense, which is primarily designed to ensure fairness to defendants, is most useful when it establishes unambiguous, administrable rules that can be applied at the pleadings stage.

A certain and predictable limitations defense is vital to the pharmaceutical industry, whose members have regularly been targeted in securities-fraud strike suits. Already facing a lengthy and cumbersome regulatory-approval process, which precludes the release of most new drug prospects, developers of innovative medicines should not be saddled with the additional risk created by unworkable legal rules that give rise to costly civil discovery and uncertain litigation outcomes. This is especially true where, as here, a more administrable test is available and consistent with Congress's intent.

2. The certainty and predictability sought by the Court and pharmaceutical companies alike would be fostered by a rule under which the limitations period begins when the publicly available information would prompt a reasonable investor of ordinary intelligence to suspect that he has been defrauded. The standard can be met without information specifically suggesting scienter, because a material misstatement will almost invariably signal that something is amiss, that fraud is a possibility, and that the investor

should investigate further. Reasonable investors do not need to be hand-delivered direct evidence of fraud before they begin to suspect that a material misstatement might have been something more than an innocent mistake. Investors are not nearly so gullible as to warrant such a paternalistic approach.

Moreover, the test advocated by the government – which would delay the running of the limitations period until a hypothetical investor completed a hypothetical investigation and obtained enough information to survive a motion to dismiss – strays far from the certainty that a limitations defense demands, and should be rejected by this Court. The government's test would force courts to address hypothetical questions about the reasonableness of a plaintiff's investigation, a task that is even more speculative – and less likely to be resolved at the pleadings stage – when investors (like Respondents) do not conduct any investigation at all. In addition to these failings, the government's test leads to the untenable result that the limitations period begins to run only when the investor no longer needs to investigate because he already has all the information required to file a viable complaint. That result is not only counterintuitive; it is also contrary to the reason that Congress extended the limitations period in the first place: namely, to allow more time for an investigation.

ARGUMENT

I. SECTION 1658(B)'S LIMITATIONS PERIOD SHOULD BE CONSTRUED TO PROVIDE THE CERTAINTY AND PREDICTABILITY REQUIRED BY COMPANIES TARGETED IN SECURITIES-FRAUD SUITS.

A. This Court Has Consistently Sought To Prescribe Certain And Predictable Rules To Govern Securities-Fraud Litigation.

1. This Court has repeatedly stressed the need for unambiguous, readily administrable rules to govern and constrain private securities-fraud lawsuits. Without such rules, the Court has admonished, securities litigation can be employed "abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). "[P]laintiffs with weak claims [can] extort settlements from" companies that are innocent, but that nevertheless fear "extensive discovery and the potential for uncertainty and disruption in a lawsuit." *Stoneridge Invest. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80-81 (2006).

The risk that such suits will force settlements is anything but fanciful. In 2008 alone, almost 100 private securities suits settled for a total value of $3.6 billion. See PriceWaterhouseCoopers, *2008 Securities Litigation Study* 18 (Grace Lamont ed., 2009), *at* http://10b5.pwc.com/PDF/NY-09-0894SECURITIES LITSTUDYFINAL.PDF. That these cases sometimes settle for substantial amounts does not mean that the lawsuits are meritorious. To the contrary, and as this

Court acknowledged over 30 years ago, the staggering cost and disruption of the discovery process places immense pressure on companies to settle – regardless of the merits – once their motion to dismiss the suit on the pleadings has been denied. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975); see also *Central Bank of Denver* v. *First Interstate Bank of Denver,* 511 U.S. 164, 189 (1994) ("uncertainty [in] the governing rules" could prompt companies, "as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial").

Given the high stakes involved, the risk of forced settlement, and the fact that the implied private right of action under § 10(b) of the Securities Exchange Act was judicially created out of whole cloth, the Court has not hesitated to consider "[t]he practical consequences" of interpreting securities-fraud liability expansively. See *Stoneridge*, 128 S. Ct. at 768-72. Litigation under § 10(b) and Rule 10b-5, the Court has consistently said, is "'an area that demands certainty and predictability.'" *Central Bank,* 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). It is an "undesirable result" in such cases to announce rules affecting liability that will lead to judicial "decisions made on an ad hoc basis, offering little predictive value" to industry participants. *Id.* (internal quotation marks omitted).

The Court has thus rejected rules that could "throw open to the trier of fact many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony." *Blue Chip Stamps*, 421 U.S. at 743. The Court has likewise eschewed issuing "shifting and highly fact-oriented disposition[s]," which do not provide "a satisfactory basis for a rule of liability imposed on the conduct of business trans-

actions." *Central Bank*, 511 U.S. at 188 (internal quotation marks omitted). And, in implementing the substantive pleading standards that Congress crafted in 1995, the Court has sought to "prescribe a workable construction" that honors the legislature's "twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims." *Tellabs*, 551 U.S. at 322.

2. The same considerations favoring clear and administrable rules of liability apply with equal, if not greater, force to the statute of limitations that governs private securities-fraud suits under § 10(b). After all, like a rule limiting the scope of liability, the statute of limitations provides a dispositive defense that is available at the pleadings stage and that has the effect of a judgment on the merits. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995); *United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916); see also 18A Wright, Miller & Cooper, *Federal Practice and Procedure* § 4441, at 217 (2d ed. 2002) ("[A] limitations dismissal is a judgment on the merits that bars a second action on the same claim."). Moreover, if a securities-fraud defendant cannot rely on the limitations defense at the pleading stage due to a fact-bound, unpredictable rule, much of the value of the defense is lost. The defendant will be forced to incur the "substantial costs" of discovery, *Tellabs*, 551 U.S. at 313, or acquiesce in an "extort[ed] settlement[]," *Stoneridge*, 128 S. Ct. at 772.

Rules that are certain and predictable advance another "primar[y]" objective of statutes of limitations: "assur[ing] fairness to defendants." *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 428 (1965). The "theory" underlying the limitations defense "is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of

limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944) (Jackson, J.); *accord John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 753 (2008) ("[S]tatutes of limitations seek primarily to protect defendants against stale or unduly delayed claims.").

Limitations periods do more, however, than help defendants. They shield "the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). And, they further important systemic interests in "repose . . . and *certainty* about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000) (emphasis added); see also S. Rep. No. 107-146, at 28 (2002) (additional views of eight Senators) (statutes of limitations in the securities area "provide for certainty in the markets").

Similar concerns over certainty and predictability animated this Court's decision to adopt the "uniform" statute of limitations that Congress later codified in § 1658(b). See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 357 (1991). In deviating from its practice of borrowing an analogous state limitations period when there is no express federal one, the Court in *Lampf* first considered "whether a uniform statute of limitations [wa]s to be selected." *Id.* The Court answered that question in the affirmative, concluding that "the federal interests in *predictability* and judicial economy counsel[ed]" in favor of a uniform rule in the context of claims under

§ 10(b) and Rule 10b-5. *Id.* (emphasis added). Federal law was better suited to provide that uniform rule, the Court explained, in part because the prospect of "multiple state limitations [periods] . . . would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.'" *Id.* (second ellipsis and second alteration in original) (quoting *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987)). The limitations scheme selected by this Court and codified by Congress should thus be interpreted with the needs for predictability, certainty, and straightforward application as the primary bases for decision.

B. Certainty And Predictability In Securities-Fraud Litigation Is Especially Critical To Pharmaceutical Companies Forced To Defend Against Private Fraud Claims.

The need for certainty and predictability with respect to securities-fraud claims is particularly acute for companies in the pharmaceutical industry, where the road to success is long and expensive, and potentially crushing liability at the end of the road can be a powerful barrier to entry. Recent estimates place the average costs of developing and securing regulatory approval for each new drug at between $800 million and $1.3 billion. See Congressional Budget Office, *Research and Development in the Pharmaceutical Industry* 2 (Oct. 2006) ("CBO Report"), *at* www.cbo.gov/ftpdocs/76xx/doc7615/10-02-DrugR-D.pdf.; Industry Profile at 38-39. From research and development to regulatory approval, moreover, the process takes approximately 12 years to complete, during which time the firm's capital is tied up and unavailable for other investments. CBO Report at 2; *see also* Industry Profile at 36 ("From the

first testing in the lab to FDA approval, the process takes an average of 10 to 15 years."). No return on that capital is earned unless and until the project succeeds – and even then, "just two in 10 medicines ever produce revenues that match or exceed average R&D costs." Industry Profile at 39. Overall, "[o]nly one of every 10,000 potential medicines investigated by America's research-based pharmaceutical companies makes it through the research and development pipeline and is approved for patient use by the United States Food and Drug Administration." PhRMA, *Innovation*, http://www.phrma.org/innovation/ (last visited Aug. 14, 2009).

In the face of these odds, legal rules that depend on highly fact-specific and *ad hoc* determinations only compound the uncertainty and costs to industry participants. At the margins, that uncertainty could tip the balance against a company pouring millions of dollars into attempting to develop the next innovation. Companies may be less likely to take the risk on a new treatment – like those that PhRMA members are currently developing for cancer, cardiovascular disease, and HIV/AIDS, see Industry Profile at 35 – when even an approved drug faces the continued uncertainty imposed by settlement-driven strike suits that cannot be dismissed on the pleadings and that can generate eight-figure legal bills. Cf. *Central Bank*, 511 U.S. at 188-89.

Many of the same characteristics that make it difficult to succeed in the pharmaceutical industry help explain why pharmaceutical companies are especially susceptible to securities-fraud nuisance suits. As noted, most new drugs do not produce a profit. And, each time the drug fails to match expectations, an enterprising plaintiffs' attorney will scour the record of all public statements in search of

anything that, in retrospect, may suggest the possibility of a misrepresentation. The attorney is aided by the lengthy regulatory-approval process, which requires generation and disclosure of information on the drug. The upshot is that each step in the process, and each set of disclosures, forces pharmaceutical companies to navigate a minefield: every positive report about a new drug can plant the seeds for a misrepresentation claim when results do not pan out as expected, and each decision not to reveal an arguable setback could lead to an allegation that the company unlawfully concealed negative material information.

The dilemma facing industry participants is evident from the lawsuits filed in recent years. Studies show that 10% of the more than 200 securities-fraud suits filed in 2008 were against life-sciences companies. *See* Kevin LaCroix, *A Closer Look at the 2008 Life Sciences Securities Lawsuits* (Feb. 3, 2009), *at* http://www.dandodiary.com/2009/02/articles/securities-litigation/a-closer-look-at-the-2008-life-sciences-securities-lawsuits/ (last visited Aug. 14, 2009). Although an increased number of suits attacked companies' accounting practices, the theory of liability in a quarter of the suits was that the defendant company made misleading statements about the safety of its product or concealed negative testing results. 2009 Survey at 2-3 & fig.2. As in this case, and of particular note, allegations of that sort have regularly followed on the heels of product-liability, consumer-fraud, and personal-injury suits against the same defendants.[2] The reality, then, is

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[2] Pet. App. 10a, 15a, 38a (decision below). *See also, e.g.*, *Masters* v. *GlaxoSmithKline*, 271 F. App'x 46 (2d Cir. 2008) (summary order); *In re Pfizer Inc. Sec. Litig.*, 584 F. Supp. 2d

that pharmaceutical companies releasing new medicines face the risk of multiple kinds of lawsuits, making it crucial to the company's planning that the limitations period for securities-fraud claims be predictable, that it encourage plaintiffs to bring suit promptly, and that it provide a meaningful defense on the pleadings should prospective plaintiffs fail to do so.

II. THE LIMITATIONS PERIOD SHOULD COMMENCE WHEN A REASONABLE INVESTOR OF ORDINARY INTELLIGENCE WOULD SUSPECT THAT HE HAS BEEN DEFRAUDED, AND SUCH SUSPICION DOES NOT REQUIRE INFORMATION SPECIFICALLY SUGGESTING SCIENTER.

1. As the case comes to this Court, three propositions are clear. First, a plaintiff need not have actual notice of the facts constituting the securities-fraud claim in order for the two-year limitations period to commence. Lower courts have unanimously held, and the parties agree, that constructive notice suffices. See Pet. Br. at 13, 18; Resp. BIO at 4-5, 15-16. Second, the constructive notice that triggers the statute of limitations is not knowledge of *all* of the facts underlying the alleged fraud, or even all of the facts needed to survive a motion for summary judgment. Instead, all sides agree that a lesser quantum of information will commence the running of the statute of limitations. Pet. Br. at 20-21; Resp. BIO at 15-16; Brief for the United States as *Amicus Curiae* at 7-8, *Trainer Wortham & Co.* v. *Betz*, No. 07-1489 (U.S. Apr. 22, 2009) ("U.S. Br."). Third, the starting point of the legal analysis is determining

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621 (S.D.N.Y. 2008); *In re Zyprexa Prods. Liab. Litig.*, 549 F. Supp. 2d 496 (E.D.N.Y. 2008).

when the plaintiff was put on inquiry notice of the fraud. A plaintiff is on inquiry notice when the market receives "storm warnings"– *i.e.*, when the available information would prompt a reasonable investor of ordinary intelligence to suspect that he has been defrauded and prompt him to undertake an investigation. Pet. Br. at 20-21; Resp. BIO at 15-17; U.S. Br. at 8, 11.

What remains in dispute, then, is (i) whether information specifically suggesting scienter is necessary for a plaintiff to be on inquiry notice; and (ii) whether the investigation that a plaintiff undertakes (or could have undertaken) after receiving inquiry notice should postpone the running of the limitations period. *Amicus* respectfully submits that the Court should answer both questions in the negative. Information specifically relating to scienter is unnecessary, and the actual or hypothetical investigation does not toll the statute of limitations, which begins to run when the plaintiff receives inquiry notice.

a. As an initial matter, there is little support in law or logic for the notion that the suspicion of wrongdoing that triggers inquiry notice must include direct evidence confirming that the alleged mistake was fraudulent (rather than benign). "Commencement of a limitations period need not," as the Fourth Circuit has explained, "await the dawn of complete awareness." *Brumbaugh* v. *Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993) (Wilkinson, J.); *accord Fujisawa Pharm. Co.* v. *Kapoor*, 115 F.3d 1332, 1334 (7th Cir. 1997) (rejecting contention "that the statute of limitations doesn't begin to run until the victim has in hand *all* the facts he needs in order to bring suit immediately"). "Inquiry notice is triggered by evidence of the possibility of fraud, not by complete

exposure of the alleged scam." *Brumbaugh*, 985 F.2d at 162; *Sterlin* v. *Biomune Sys.*, 154 F.3d 1191, 1203 (10th Cir. 1998) (same). As Petitioners have shown, it follows from this principle that information specifically supporting all elements of a securities-fraud claim – including evidence of scienter – is *not* a prerequisite to an investor's being on inquiry notice. Pet. Br. at 19-28.

This position makes eminent practical sense. After all, a material misstatement with consequences serious enough to warrant the filing of a federal lawsuit will almost invariably trigger at least a suspicion of fraud. Responsible investors are not Pollyannas. The disclosure should cause the investor's ears to perk up, suggesting that "'something may have been amiss'" and that the investor should inquire into the possible wrongdoing. See *Theoharous* v. *Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001); see also *Rotella*, 528 U.S. at 555 (under discovery rule, "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock"); *Wood* v. *Carpenter*, 101 U.S. 135, 141 (1879) ("'Whatever 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. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.'").

As Petitioners explain at greater length, this case is emblematic. Pet. Br. at 34-39. The FDA issued a warning letter, the contents of which previewed the theory that Respondents would advance in their complaint over two years later: "that the company and certain of its officers and directors intentionally misrepresented the cardiovascular safety of Vioxx and, consequently, the impact that Vioxx would have on Merck's financial health." Pet. App. 54a (Roth, J.,

dissenting). If (i) the detailed allegations in the FDA letter, (ii) the ensuing media coverage, (iii) the drop in stock price, and (iv) the product-liability and consumer-fraud suits filed against Merck did not suggest the possibility of fraudulent conduct and a need to investigate, see *id.* at 51a-59a, it is hard to see what, short of a public confession, would have.

Moreover, the standard proposed here provides a reasonable measure of the certainty that is a hallmark of a statute of limitations. See *Rotella*, 528 U.S. at 555. Inquiry notice in the form of "storm warnings" is, as a general matter, a point that courts can readily ascertain based on materials in the public domain. There is typically an identifiable point at which the misstatement was revealed to the market. That may be, as here, when reports are published in the mainstream media, see Pet. App. 88a-89a (reports in the New York Times, Wall Street Journal, USA Today, and Associated Press), or in press outlets specialized in business or industry news, *e.g.*, *Sterlin*, 154 F.3d at 1202-04 (article in business periodical). The misstatement could just as easily be revealed in court filings in other litigation. See *Masters* v. *GlaxoSmithKline*, 271 F. App'x 46, 49 (2d Cir. 2008) (suits under fraud and product-liability theories); *In re Zyprexa Prods. Liab. Litig.*, 549 F. Supp. 2d 496, 536 (E.D.N.Y. 2008) (same); see also *Theoharous*, 256 F.3d at 1228 (bankruptcy filing). These sorts of identifiable points appear throughout the sizable body of case law on inquiry notice that the courts have developed over the last three decades, see *Cook* v. *Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978); Pet. Br. at 21; Resp. BIO at 15-16, which further suggests that the proposed standard will be the most easily administered.

b. The test proposed here also has the advantage of giving effect to Congress's expressed intent in enacting the two-year limitations period. Under this test, once the investor is on inquiry notice, he has a two-year window during which he may conduct an investigation and draft the complaint. See Pet. Br. at 14, 40. Indeed, the very reason that Congress extended the limitations period from one year to two was its belief that the one-year period adopted by the Court in *Lampf* did not provide sufficient time for an investor to "unravel" the fraud. See S. Rep. No. 107-146, at 9 (discussing "harsh" effects of one-year period). The purpose of the extra year, in other words, was to give the investor enough time to investigate. See also Pet. Br. at 32-33.

The alternative construction of the statute, which would toll the limitations period until a reasonable investor has completed his investigation, would render meaningless Congress's decision to extend the period to two years. The investor – together with his lawyer, who, in all likelihood, is the one who conducted the investigation – would have 730 days to do nothing but write a complaint. And it does not take two years to do that.

Amicus' proposed standard also has other virtues. First, it establishes an "objective" test consistent with what Congress had in mind when it enacted § 1658(b). See S. Rep. No. 107-146, at 29 (additional views of eight Senators) (legislation "not intended to change existing case law holding that an objective standard should be used to measure the starting point" of the limitations period). This objective test, in turn, promotes diligence by encouraging investors to "tak[e] the actions necessary to bring the fraud to light." *Brumbaugh*, 985 F.2d at 162. In so doing, the test helps to ensure that evidence presented on the

claim will be fresh, and that defendants will not be prejudiced by faded memories, absent witnesses, or lost documents. See *Rotella*, 528 U.S. at 559; *Kubrick*, 444 U.S. at 117; *Brumbaugh*, 985 F.2d at 162. Just as significant, the proposed test provides companies with a meaningful sense of repose within the five-year outer limit that Congress separately prescribed. See *Rotella*, 528 U.S. at 559; *Kubrick*, 444 U.S. at 117; *Brumbaugh*, 985 F.2d at 162. The objective standard, in sum, honors the balance that Congress has struck in reforming securities-fraud litigation over the past two decades: it requires plaintiffs to file suit soon after they are put on notice of their claims, but affords plaintiffs ample time to conduct the investigation. See *Sterlin*, 154 F.3d at 1203.

2. In its brief in a related case, the government has urged the Court to adopt a test that would toll the running of the statute of limitations until a hypothetical reasonable plaintiff completed a hypothetical investigation. Under that formulation, courts would first identify the point at which the investor had enough information to initiate an investigation into possible misconduct, and then "ascertain[] at what time the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud." U.S. Br. at 8 (internal quotation marks omitted). The answer to the second question, the government submits, determines the start of the limitations period and is equivalent to the moment at which the investor would have enough information to plead a claim that could survive a motion to dismiss. *Id.* at 9. This Court should reject any such approach, which strays far from the certainty and predictability that securities litigation requires and which leads to a nonsensical result.

a. First, the government's test would create uncertainty by forcing courts to address a series of hypothetical questions that have no clear or easy answers. Such questions include:

- What information would an investor exercising "reasonable diligence" seek?
- What documents would he need to see?
- What individuals or institutions would he contact, and to whom would he speak?
- How long should a court assume it would take for any potential witnesses to return calls or otherwise respond to queries?
- How long should it take the investor to carry out all of these preliminary steps, as well as the follow-up needed to ensure that the contemplated fraud claim would not be frivolous?
- Keeping in mind the reality of the industry – in which lawyers often seek out investor plaintiffs, not vice versa – is the hypothetical investor represented by an attorney who can contribute resources to the investigation?

These questions are all the more difficult to answer where, as here, the investor-plaintiff has conducted no investigation whatsoever. Courts would in essence have to imagine a hypothetical investigation removed from any real-world actions that might serve as useful guideposts. See DRI Br. 14-18. This represents a far cry from the rule of predictable and "straightforward" application that this Court envisioned when adopting the limitations period in *Lampf*, 501 U.S. at 357. And, with some courts already hesitant to resolve an inquiry-notice dispute on the pleadings, *e.g.*, *LC Capital Partners, LP* v. *Frontier*

Ins. Group, Inc., 318 F.3d 148, 156 (2d Cir. 2003) (inquiry notice is an issue "often inappropriate for resolution on a motion to dismiss") (internal quotation marks omitted), the *ad hoc* determinations required by the government's rule would almost certainly get pushed back to the summary-judgment stage, if not further – after the defendant has borne the expense and disruption of civil discovery. By that point, many of the benefits of the limitations statute will have been lost, and the defendant often will have succumbed to the hydraulic pressure of protracted litigation and opted for settlement.

b. Even assuming that courts could easily resolve the kind of questions set forth above, which they likely could not, the view adopted by the government still suffers from a number of serious infirmities. Most evidently, the government's rule confuses the information that a plaintiff needs to have marshaled by the *end* of the two-year period with the information that will suffice to *trigger* the two-year period in the first place. This result makes no sense: the time to conduct an investigation begins to run only after the investor already has all the information he needs to survive a motion to dismiss, and thus no longer has any need to investigate. Under this view, the investor is given two years to draft a complaint – and, as discussed above, that is a task that takes days, not years, to complete. As Judge Posner aptly put it, "the potential plaintiff can complete his investigation, draft his complaint, and put the complaint in a drawer to be taken out in [two years] and filed if the price of the stock has fallen." *Fujisawa*, 115 F.3d at 1334.

c. The government's position also rests on the dubious premise that the limitations period should start running only when the plaintiff has enough

information to survive a motion to dismiss under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). U.S. Br. at 9 & n.2. In support of this premise, the government not surprisingly cites no authority. Moreover, the government overlooks the fact that *Lampf* (which first established the limitations period) *predates* the PSLRA by four years. It is thus inconceivable that the Court intended to connect the limitations period with the not-yet-enacted PSLRA standard for surviving a motion to dismiss. Likewise, because Congress used the same language in § 1658(b) that this Court used in *Lampf*, changing only the length of the limitations and repose periods, there is no basis for concluding that Congress intended to toll the limitations period until the plaintiff has all the information necessary to survive a motion to dismiss. Cf. *Rotella*, 528 U.S. at 557 (rejecting trigger for limitations period that would dishonor legal rules "that Congress itself accepted and relied upon").

3. To the extent the Court is concerned that the objective standard proposed here would have the "harsh" effect of barring some potentially meritorious claims, that is "true in [the] case of any statute of limitations." See *Scaife Co.* v. *Comm'r*, 314 U.S. 459, 463 (1941); see also *Kubrick*, 444 U.S. at 117. But this Court has long recognized that fairness considerations of this sort, although possibly a basis for congressional intervention, "are not appropriate grounds for relief by the courts from the strictness of the statutory demand." *Scaife Co.*, 314 U.S. at 463.

"[R]elief by the courts" in this context would be especially misplaced for at least three reasons. First, securities-fraud plaintiffs are represented (and often sought out) by a sophisticated bar of specialized attorneys, see DRI Br. 25-28, such that they hardly

resemble the individual plaintiff doing his own legwork to take on a powerful corporation. Second, as a practical matter, all the plaintiff must do to satisfy the statute of limitations is file his complaint within the two-year window. Plaintiffs will generally be afforded ample opportunity to amend their complaints to incorporate any new information, see *Belizan* v. *Hershon*, 434 F.3d 579, 583-84 (D.C. Cir. 2006) (federal rule establishing liberal amendment policy not altered by PSLRA), and only after multiple amendments are complaints likely to be dismissed with prejudice. See, *e.g.*, Pet. App. 20a (fourth amended complaint). Finally, Congress has shown itself willing to extend the statute of limitations when it believes that victims of securities fraud are in fact being denied a suitable remedy. See S. Rep. No. 107-146, at 9. Congress of course remains free to reconsider the need for a longer limitations period for claims under § 10(b) and Rule 10b-5, including the option of a three-year period that was proposed but rejected in 2002. See S. Rep. No. 107-414, at 54 (2002) (minority views of five Senators).

CONCLUSION

For the foregoing reasons, and those stated in Petitioners' brief, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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August 17, 2009