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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.,

Respondents.

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

AMICUS CURIAE BRIEF OF THE COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Council of Institutional Investors is a not-for-profit association of more than 120 public, labor, and corporate pension funds with assets exceeding $3 trillion. Its members are major long-term shareholders with duties to protect the retirement assets of millions of American workers. The Council is an advocate for strong corporate-governance standards. Its members seek to protect fund assets through proxy votes, shareholder resolutions, negotiations with regulators, discussions with management, and, when necessary, litigation. The Council has previously appeared as an amicus in cases affecting shareholder rights. See, *e.g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002).

The interests of the Council and its members are directly implicated by this case. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Congress recognized that institutional investors are uniquely positioned to represent the interests of absent class members and to prevent collusion between

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

defendants and plaintiffs' attorneys in settling lawsuits. See, *e.g.*, H.R. Conf. Rep. No. 104-369, p. 34 (1995) ("The Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions."). Congress further recognized that institutional investors are America's largest shareholders and "have the most to gain from meritorious securities litigation." *Ibid.* (quoting testimony of Maryellen Andersen, then treasurer of the Council). Institutional investors also have the most to lose from meritless litigation that depletes shareholder wealth. See S. Rep. No. 104-98, p. 9 (1995) ("We are . . . hurt if a system allows someone to force us to spend huge sums of money in legal costs by merely paying ten dollars and filing a meritless cookie cutter complaint against a company or its accountants." (quoting testimony of Maryellen Andersen)). Accordingly, the Council has a strong interest in ensuring that the Court's interpretation of the PSLRA and the Sarbanes-Oxley Act of 2002 is based on an accurate picture of the current state of securities class-action litigation. The Council believes that the interpretation of these statutes should further Congress's manifest goal of allowing legitimate suits to proceed while discouraging meritless "strike suits."

SUMMARY OF THE ARGUMENT

This Court and Congress have repeatedly noted that private securities-fraud litigation can exact exorbitant costs on innocent corporations. Recognizing the high stakes involved, Congress enacted the PSLRA, heightening the pleading standards for section 10(b) actions. Congress heightened the pleading standards to curtail the rising number of meritless lawsuits while preserving investors' ability to recover on meritorious claims. The PSLRA appeared to accomplish the first of these goals, curbing meritless litigation. But as companies became more proficient at hiding fraudulent conduct, the second goal, preserving meritorious claims, began to suffer.

Then came Enron, WorldCom, Adelphia, and numerous other major business scandals that reflected massive audit failures and, in some cases, undetected accounting misconduct. The confidence of the investing public was justifiably shaken. Fears arose that the lack of trust in the markets would spell long-term problems for the markets and the economy.

Congress understood the need to act quickly to usher in fundamental reform and soon passed Sarbanes-Oxley. Recognizing the vital role that private securities litigation led by institutional investors plays in preventing corporate fraud, Congress extended the historical statute-of-limitations scheme, now requiring plaintiffs to file a section 10(b) action not later than the earliest of (1) two years after the discovery

of the facts constituting a violation or (2) five years after the violation.

The Council does not take a position on how the Court should interpret the Sarbanes-Oxley changes to the statute of limitations. The Council believes, however, that the strict test suggested by petitioners and their amici would have undesirable policy consequences. Under petitioners' suggested interpretation, the current statute of limitations would unreasonably preclude meritorious suits in contravention of Congress's express intent to ensure that plaintiffs have ample time to meet the PSLRA's stringent pleading standard. Further, petitioners' interpretation, if adopted, would effectively decrease the time available to investigate a potential fraud. This would force putative plaintiffs to bring suits based on knowledge of an innocent misstatement rather than the fraud the PSLRA intended to prevent. This test would thus increase meritless, lawyer-driven litigation—resulting in increased costs on the shareholders who will be forced to incur the expense of preemptive investigations into what may often be innocent misstatements. Finally, the attack on the value of private securities litigation by petitioners and some of their amici is unwarranted. Private enforcement of the securities laws is an essential supplement to federal enforcement activity and has accordingly strengthened, not weakened, the United States' capital markets.

ARGUMENT

When construing the laws governing securities-fraud claims, this 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, Inc.*, 551 U.S., at 322. Petitioners' proposed standard would contravene both of these goals because it would preclude meritorious suits based on an inability to timely ascertain the fraud committed and would increase preemptive filings based on innocent misstatements.

The Council believes that the Court should interpret §1658(b) to preserve Congress's intended balance between discouraging frivolous, lawyer-driven litigation and enabling investors to recover on meritorious claims. The PSLRA and Sarbanes-Oxley have achieved those twin goals by dramatically increasing the proportion of pretrial dismissals and increasing the number of institutional investors as lead plaintiffs in securities class actions.

I. Congress Recognized That Securities Litigation Under the PSLRA Requires Ample Time to Investigate and Prepare.

A. Identifying Fraud Takes Time.

1. Investors Face Significant Challenges in Acquiring and Analyzing Information.

Stock ownership has become a preferred investment of the general public, especially for people saving for retirement. An estimated "fifty-five percent of American families now own stock in public companies." Biggs, Shareholder Democracy: The Roots of Activism and the Selection of Directors, 39 Loy. U. Chi. L.J. 493, 498 (2008). This amounts to more than 90 million Americans owning shares of stock through individual investments or mutual funds. NYSE, A Guide to the NYSE Marketplace, at 2 (2006), http://www.nyse.com/pdfs/nyse_bluebook.pdf. And investors have numerous investment options from which to choose.

More than 2,600 companies are listed on the New York Stock Exchange, representing a total global market capitalization of over $22.6 trillion. *Id.*, at 3. In 2006, almost 1.8 billion shares, valued at over $68.5 billion were traded on the NYSE on an average trading day. *Ibid*. The NASDAQ lists approximately 3,100 companies and, on average, trades more shares per day than any other market in the United States. See NASDAQ, Get the Facts, http://www.nasdaq.com/reference/market_facts.stm (last visited Oct. 21, 2009).

With the large number of securities available and many investors holding a diversified portfolio of stocks, monitoring investments for fraud is no easy task. In *Dura Pharmaceuticals, Inc*. v. *Broudo*, this Court held that plaintiffs in securities-fraud cases must allege and ultimately prove a causal relationship between a stock-price decline and the public revelation of the fraud. 544 U.S. 336, 345-346 (2005). Because stock prices are assumed to reflect the sum of all publicly available information concerning the company and the industry in which it operates, potential plaintiffs must be keenly aware of new information released into the public sphere. And the amount of new information released is voluminous.

Companies introduce numerous types of information into the marketplace on a daily basis. Each company alone may make more than ten filings per year with the SEC, not counting restatements. Additionally, companies regularly file press releases, maintain websites containing company information, news, and events, and, in the case of pharmaceutical companies, conduct studies regarding their existing products, as well as those still in development, and release reports of the results.

Restatements, for example, are a type of material information particularly likely to move the market. A restatement is "the process of revising previously issued financial statements to reflect the correction of an error in those financial statements." Fin. Accounting

Series, Statement of Fin. Accounting Standards No. 154—Accounting Changes & Error Corrections, at 3 (May 2005), http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175818827484&blobheader=application%2F.pdf. A restatement need not be made if an item is not material. See *id*., at 11 ("The provisions of this Statement need not be applied to immaterial items.").

The number of financial restatements has been increasing significantly over recent years, hitting an all time record in 2006 with as many as 1,538 restatements involving nearly 10% of all public companies. Grothe, The Errors of Their Ways, at 1 (Feb. 27, 2007), http://www.pbs.org/nbr/pdf/GlassLewis-Errors.pdf (hereinafter Error of Their Ways). In 2006, 146 companies restated more than once, with 25 companies restating multiple times in the same year. *Ibid*. Although the number of restatements declined to 1,272 in 2007, Townsend & Baldwin, Revenue Recognition for Collaborative Arrangements in the Biotechnology Industry, at 9 (Aug. 8, 2008), http://www.bio.org/tax/funding/revenuerecognitionprinciplesstudy.pdf, "the number is still quite high." SEC Advisory Committee, Final Report of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission, at 76 (Aug. 1, 2008), http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf (hereinafter SEC Advisory Committee Report).

In addition to restatements, companies must disclose if they have material weaknesses. Material

weaknesses are control deficiencies that result in more than a remote likelihood that material misstatements in annual or quarterly financial reports will not be prevented or detected. Grothe, The Materially Weak, at 5 (Feb. 27, 2007), http://www.pbs.org/nbr/pdf/GlassLewis-Materially.pdf (hereinafter Materially Weak). Between 2004 and 2006, a total of 2,400 companies, approximately 17% of all U.S.-listed companies, disclosed at least one material weakness. *Id.*, at 7. In that same period, companies disclosed a total of 6,718 material weaknesses. *Id.*, at 11.

Investors have the monumental task of sorting through the mass of information available in the public sphere to determine whether a company has engaged in securities fraud. And investors lack a specific type of disclosure that would clearly indicate that a fraud has occurred. Even restatements and disclosures of material weaknesses cannot be trusted as per se indicators of fraud. Innocent misstatements are very common in large, complex companies with numerous subsidiaries.

Additionally, because a significant portion of restatements involve minor or non-core corrections, the impact of a restatement—and its use as a proxy for fraud—is questionable. For example, restatements from non-core expenses (*i.e.*, non-operating or non-recurring expenses) increased from approximately 20% of total restatements in 1997 to nearly 40% in 2006. Scholz, The Changing Nature and Consequences of Public Company Financial Restatements 1997-2006, at 5 (April 2008), http://www.treas.gov/press/

releases/reports/FinancialRestatements_1997_2006.pdf (hereinafter The Changing Nature). In fact, nearly half of all restatements in 2006 involved accounting for non-operating expenses, non-recurring events, and reclassifications that typically do not have discernibly negative market reactions. *Id*., at 1.

A potential plaintiff's task of sorting through innocent information from what is fraudulent is further complicated by the standard operating procedures of companies making restatements. Once a company notifies the SEC and investors that a restatement may be necessary because a material error has been identified, "companies often go into a 'dark period' and issue very little financial information to the public." SEC Advisory Committee Report, at 6. The "dark period" inhibits a potential plaintiff from uncovering whether the company has committed securities fraud or has simply made a benign misstatement. "This silence creates significant uncertainty regarding the size and nature of the effects on the company of the error or the issues leading to the restatement." *Id*., at 85. In fact, the SEC Advisory Committee opined that "the current disclosure surrounding a restatement is often not adequate to allow investors to evaluate the company's operations." *Ibid*.

The "dark period" is often used as a shield against potential litigation. See *ibid*. ("We understand that, in the current legal environment, companies are often unwilling to provide disclosure of uncertain information."). But without the information necessary

to determine whether a company has committed fraud or simply made a benign misstatement, potential plaintiffs are hard pressed to meet the higher pleading standard of the PSLRA.

2. Petitioners' Standard Would Increase the Difficulties Investors Face in Identifying Fraud.

Recognizing the hardship of ferreting out fraud and in response to several massive frauds that shook the financial markets, Congress passed Sarbanes-Oxley. In extending the limitations period for section 10(b) claims to two years from the date the parties know of the fraud and five years from when the fraud actually occurred, Congress acted out of concern that the preexisting one and three-year periods would foreclose harmed investors that were unable to timely prepare complaints sufficient to satisfy the PSLRA's heightened pleading requirements. Congress did not intend for §1658(b) to bar injured shareholders from filing a meritorious securities-fraud lawsuit based on the statute of limitations. "Statutes of limitations are simply not proper means of deciding legitimate cases which should be decided on the merits—that is the role of the underlying substantive law." S. Rep. No. 107-146, p. 9 (2002). Instead, Congress extended the statute of limitations because "[e]specially in complex securities fraud cases, the current short statute of limitations may insulate the worst offenders from accountability and rewards those who can successfully

cover up their misconduct for at least a year." S. Rep. No. 107-146, p. 8.

Congress had ample reason to be wary of a short statute of limitations. "In many securities fraud cases the short limitations period under current law is an invitation to take sophisticated steps to conceal the deceit. The experts have long agreed on that point, and unfortunately they have been proven right." *Id.*, at 9. Public companies have already begun engaging in these deceptive tactics.

For example, there is an upward trend in "stealth restatements." Errors of Their Ways, at 1. In a "stealth restatement" a company does not file amended financial statements and does not make the Form 8-K filings with the SEC to warn investors that their past reports were not reliable. *Ibid*. Instead, the company merely corrects its financials in its next regularly scheduled annual and quarterly filings. *Id.*, at 20. In 2006 alone, approximately 40% of companies filed their restatements without using amended filings. *Ibid*. At the same time, the incidence of restatements involving fraud as identified by an SEC issued Accounting and Auditing Enforcement Release or by company admission has decreased from 29% of all restatements in 1997 to 2% in 2006, The Changing Nature, at 12-13—evidence that companies have become better at hiding the frauds they perpetrate.

Additionally, companies are often deficient in providing full disclosure, even when statutorily required. For instance, although a restatement strongly

suggests that a material error in a company's financial statements was not detected, "[c]uriously, the companies that restated [in 2006] aren't necessarily the same ones that disclosed material weaknesses." Errors of Their Ways, at 16. This result may not be surprising when one considers that about 95% of all companies that disclosed material weaknesses immediately after Sarbanes-Oxley took effect "had told investors that their controls were effective, right up through the last quarter before their auditors conducted their own independent internal-control evaluations." Materially Weak, at 20. "That tells us that management either lied or just wasn't aware of the weaknesses, neither of which bode well for investors." *Ibid*.

Under petitioners' proposed standard, companies committing fraud would have further incentives to "hide the ball"—releasing information that appears to be a benign misstatement, knowing that they will have a strong legal argument that such information would start the statute of limitations and potentially curtail any meritorious litigation. See S. Rep. No. 107-146, p. 8. Petitioners' proposed standard would thus allow a company to manipulate the publicly available information in a way that serves as both a sword and a shield.

B. Institutional Investors Do Not Race to the Courthouse.

Congress knew the significant investment of time and resources needed to meet the PSLRA's high pleading standard once potentially fraudulent conduct is known by the investor. In deciding to change the one-year limitations period to two years, the Senate Judiciary Committee explained that "[t]he one year statute of limitations from the date the fraud is discovered is . . . particularly harsh on innocent defrauded investors," because "the best cons are designed so that even after victims are cheated, they will not know who cheated them, or how." S. Rep. No. 107-146, p. 9. The committee further explained that "[e]specially in securities fraud cases, the complexities of how the fraud was executed often take well over a year to unravel, even after the fraud is discovered." *Ibid*.

In addition to the burden of meeting the requisite pleading standards, institutional investors must also determine if litigation is warranted based on the merits of the case and their fiduciary duties. Therefore, once evidence of a potential fraud is discovered, institutional investors conduct a careful evaluation to weigh the benefits and burdens of protracted litigation, decreasing the time available under the statute of limitations.

For example, before an action can be filed, the State of Wisconsin Investment Board (SWIB) requires its internal legal staff to extensively evaluate the case

and make a recommendation to a committee consisting of the chief legal counsel, the executive director, and the chief investment officer. See SWIB, Sec. Lit. Class Action Procedures, http://www.swib.state.wi.us/Litigation.aspx (last visited Oct. 10, 2009). If the committee members unanimously agree, the chief legal counsel may then retain outside counsel to independently evaluate the merits of the case. *Ibid*. Only after the committee unanimously approves the outside counsel's recommended action may SWIB initiate, join, appear in, or submit a filing in any public-market corporate-fraud litigation. *Ibid*.

The Iowa Public Employees' Retirement System (IPERS) conducts a similar process to determine whether to serve as a lead plaintiff in a securities-fraud case. The IPERS internal evaluation requires its legal staff to determine, among other things, whether there is a "very strong" factual and legal basis indicating that it is "highly probable" that litigation would be successful, the "potential prospective positive impact that corporate governance changes required as a result of legal action may have on the value of IPERS' current holdings," and "[w]hether there are staffing or resource constraints that might make it difficult to effectively pursue the case actively." Iowa Pub. Employees' Ret. Sys., Sec. Monitoring & Lit. Policy, at 2-3 (Sept. 2008), http://www.ipers.org/publications/misc/pdf/financial/investments/policies/secmonlit.pdf. The results of the comprehensive internal evaluation are presented to the board of directors for review and determination. *Id*., at 3. The Board

may also consult with outside organizations to aid in its decision. *Id*., at 4.

As shown by the detailed process undertaken by the SWIB and IPERS, securities litigation is not entered into lightly by institutional investors. See Cal. State Teachers' Ret. Sys. Corporate Governance Program Policies, at 3-5 (Apr. 2006), http://www.calstrs.com/Investments/CorpGovPolicies_200604.pdf (requiring the board of directors to determine whether to seek lead plaintiff status based on an internal evaluation and an independent assessment from outside counsel). Despite the comparably larger holdings of a stock than an individual investor, institutional investors simply do not have the resources to investigate every suspicious communication released by a company for fraudulent activity. Instead, based on the considerable resources required to conduct an internal evaluation, institutional investors must be judicious in investigating a potential fraud.

Congress extended the statute-of-limitations scheme to provide potential plaintiffs with sufficient time to fully investigate a possible securities-fraud claim rather than have plaintiffs race to the courthouse and rely on artful pleading. Institutional investors are precisely the type of potential plaintiffs that will use this time wisely, conducting a full investigation before bringing an action.

C. Petitioners' Standard Will Increase Meritless Filings.

Because extensive investigation is often required to uncover a fraud, under petitioners' standard, plaintiffs will be faced with a Hobson's choice—either investigate every potential misstatement for fraudulent intent (an untenable option for even the most well-resourced institutional investors), or preemptively file lawsuits to preserve their rights. Similar to the one-year statute of limitations formerly present for 10(b) actions, petitioners' proposed standard "sets up a perverse incentive for victims to race into court, so as not to be barred by time, and immediately sue." S. Rep. No. 107-146, p. 9. Indeed, "[p]laintiffs who wish to spend more time investigating the matter or trying to resolve the matter without litigation" will be punished under petitioners' standard. *Ibid*. And those that sit back without investigating the misstatement as a hedge against a decrease in stock price do so at their own peril—running the risk that a court of competent jurisdiction will conclude that the plaintiffs could and should have discovered the fraudulent activity and are thus barred from bringing suit.

Shortening the effective statute of limitations "does nothing to discourage frivolous cases, as a plaintiff operating in bad faith would have little trouble meeting the [two] year deadline and simply throwing in every possible defendant and every claim." *Ibid*. "Instead of stopping bad faith suits, the short statute [would] merely block[ ] the meritorious claims of fraud victims." *Ibid*. Petitioners' proposed

standard would require investors to question every potential misstatement and preemptively file suits based not on concrete investigation findings but instead on artful pleading.

II. PRIVATE ENFORCEMENT ACTIONS ARE CRUCIAL TO DETERRING FRAUD.

A. Private Securities Litigation Is an Essential Supplement to Public Enforcement.

When Congress enacted the PSLRA, it recognized that private securities litigation is "an indispensable tool with which defrauded investors can recover their losses" and is crucial "to the integrity of American capital markets." H.R. Conf. Rep. No. 104-369, p. 31. Similarly, the Court has emphasized that "implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964)).

The SEC has also consistently stressed the importance of private litigation as a supplement to its limited enforcement resources. Private enforcement is particularly important because funding for public enforcement has not kept pace with growth in the securities market. See Securities Litigation Uniform Standards Act of 1997, Hearing on S. 1260 Before the

Subcomm. on Sec. of the S. Comm. on Banking, Housing, and Urban Affairs, 105th Cong. (1997) (prepared testimony of Arthur Levitt, SEC Chairman, and Isaac C. Hunt, SEC Commissioner), http://www.sec.gov/news/testimony/testarchive/1997/tsty1997.txt ("Private actions are an especially important supplement to the Commission's enforcement program today because of the phenomenal growth of the securities industry during a time when the Commission's staff and budget levels have remained relatively constant."); see also Seligman, The Transformation of Wall Street: A History of the SEC and Modern Corporate Finance 630 (3d ed. 2003) (during most of the 1990s, the SEC's budget grew at 6% per year, while virtually every significant measure of securities activity grew far faster).

Some of the amici supporting petitioners suggest that private securities litigation has caused the flight of capital from the United States. But this is a dubious proposition. A recent Goldman Sachs study concluded that economic and geographic factors, rather than the legal environment, were primarily responsible for the shift in global capital-markets activity. See O'Neill et al., Is Wall Street Doomed?, at 1 (Feb. 14, 2007), http://www.law.duke.edu/globalmark/web/conferences/2007roundtable/pdf/goldmansachs.pdf (explaining that the United States has been losing market share for decades and that growth of capital markets outside the United States is a "natural consequence of economic growth and market maturation elsewhere").

Similarly, an Ernst & Young report concluded that the relative increase in non-U.S. listings of non-U.S. companies is due primarily to more liquid overseas markets and a longstanding trend for companies to go public in their home countries rather than in response to regulations in the United States. See Ernst & Young, Global Capital Market Trends—U.S. IPO Market Strength and Leadership 2006 Year in Review & 2007 Outlook, at 4 (Aug. 2007), http://www.cfo.com/whitepapers/index.cfm/download/10317011. Ernst & Young also found that the United States is very successful in attracting those companies that choose not to list locally and put themselves "in play" among capital market competitors. See *id.,* at 4-5. That success is especially impressive because commissions and fees to take a company public are higher in the United States than in other countries. See Chen & Ritter, The Seven Percent Solution, 55 J. Fin. 1105, 1112-1113 (2000). Other analysts have questioned the quality of foreign IPOs. See Henry, London's Freewheeling Exchange, BusinessWeek, Nov. 27, 2006, at 40 (describing evidence that London's lax standards attract companies that could not go public in the U.S.); *ibid*. (noting that, according to a Dealogic study, IPOs greater than $100 million were up 20% on the New York Stock Exchange in 2006, compared to only 11% on the London Stock Exchange).

Further, foreign firms that have cross-listed on American exchanges have lower costs of capital and increased valuations, demonstrating that investors

rate companies more highly when they subject themselves to United States laws and regulations. See, *e.g.*, NYSE Group, Inc., Foreign Firms Cross-Listed in U.S. Valued Higher, The Exchange, Vol. 12, No. 10 (Oct. 2005), http://www.nyse.com/about/publication/1127731093408.html; Niemeier, American Competitiveness in International Capital Markets (Sept. 30, 2006), http://www.pcaobus.org/News_and_Events/Events/2006/Speech/09-30_Niemeier.aspx (concluding that "claims that the cost of securities regulation in the United States . . . has damaged the competitiveness of U.S. companies and markets are to my mind overstated"); *ibid*. ("the U.S. financial reporting and disclosure system has strengthened U.S. markets' resilience for the long-term and contributes significantly to the competitive edge the companies that list in U.S. markets enjoy").

In short, private enforcement of securities laws is not responsible for increased competition from foreign capital markets. Rather, as Congress and the SEC have long recognized, such enforcement is crucial to preserving the integrity and thus the preeminence of the United States' markets.

B. The PSLRA and Sarbanes-Oxley Have Succeeded in Reducing Meritless Litigation and Agency Costs.

1. The PSLRA and Sarbanes-Oxley Have Reduced Meritless Litigation.

In enacting the PSLRA, Congress aimed to reduce the settlement value of meritless lawsuits by permitting dismissal before costly discovery. See H.R. Conf. Rep. No. 104-369, p. 37; S. Rep. No. 104-98, p. 14. Combined with Sarbanes-Oxley, the PSLRA has served that purpose. The pretrial dismissal rate for securities class actions has nearly doubled since enactment of the PSLRA. Between 1991 and 1995, dismissals accounted for approximately 19% of dispositions. Foster, Miller, & Plancich, Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar, at 4 (Jan. 2007), http://www.nera.com/image/BRO_Recent_Trends_SEC1288_FINAL_0307.pdf. However, between 2004 and 2006, over 41% of all cases filed have been dismissed. See Plancich & Starykh, Recent Trends in Securities Class Action Litigation: 2009 Mid-Year Update, at 16 (July 2009) (hereinafter 2009 Mid-Year Update).

> "The high and apparently rising dismissal rate is not consistent with the thesis that baseless suits mature into extortionate settlements. Instead, the declining rates of filings support the view that doctrinal and legislative developments reviewed above are having a most sobering impact on decisions

> to prosecute securities class action settlements." Investor Protection: A Review of Plaintiffs' Attorney Abuses in Securities Litigation and Legislative Remedies, Hearing Before the Subcomm. on Capital Markets, Ins., & Gov. Sponsored Enters. of the H. Comm. on Fin. Servs., 109th Cong. 66 (2006) (prepared statement of James D. Cox), http://financialservices.house.gov/media/pdf/109-102.pdf.

Further, while there is no consistent post-PSLRA trend in the total number of securities class actions filed, the number of class-action filings dropped significantly in the first half of 2009. The 87 filings in the first half of 2009 was more than 22% less than the total filings in each individual half of 2008. Cornerstone Research, Securities Class Action Filings—2009 Mid-Year Assessment, at 2 (2009), http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_Research_Filings_2009_MidYear_Assessment.pdf (hereinafter 2009 Mid-Year Assessment). If this filing rate continues, the total for 2009 would represent an approximate 12% decrease from the annual average for the twelve years ending December 2008. *Id.*, at 4.

In contrast, the occasional spikes in filings in the post-PSLRA period do not reflect any general trend. For example, plaintiffs filed a large number of actions in 2007 and 2008 due to the subprime lending collapse. "As the subprime lending meltdown grew into a full-blown credit crisis, the number of filings related to the credit crisis also grew, both in absolute number

and as a fraction of all filings." 2009 Mid-Year Update, at 1. But "[t]he recent decline in market volatility raises the possibility of a return to the subdued levels of filing activity observed from the third quarter of 2005 to the second quarter of 2007." 2009 Mid-Year Assessment, at 5. In fact, only 2.8% of companies in the S&P 500 index were named defendants in a federal securities class action in the first half of 2009 compared with 9.2% in 2008. *Id*., at 8.

Additionally, since Congress enacted the PSLRA and Sarbanes-Oxley, the average and median settlement amounts have increased—reflecting a higher proportion of meritorious litigation. After the passage of Sarbanes-Oxley, the average settlement has been nearly $50 million compared to an average of $17 million in the pre-Sarbanes-Oxley period. 2009 Mid-Year Update, at 22; see also Ryan & Simmons, Securities Class Action Settlements—2008 Review and Analysis, at 2 (2009), http://www.cornerstone.com/files/Publication/0e3f5375-16a5-4a03-90a0-0174fd516581/Presentation/PublicationAttachment/c3336b87-6ac3-44e7-8ab1-018ba7015c48/Cornerstone_Research_Settlements_2008_Analysis.pdf ("The median amount for cases settled in 2008 was $8 million . . . represent[ing] an increase over the median for all the cases settled from 1996 through 2007."); Larsen & Buckberg, SEC Settlement Trends: 2Q09 Update, at 2 (Aug. 3, 2009), http://www.nera.com/image/PUB_Settlements_Update_0809.pdf ("[T]he average [SEC settlement] through the first half of 2009 was $10.1

million, an increase over the full-year average of $8.4 million in 2008.").

The higher settlement values exhibit "more precise targeting of securities class actions against firms likely to have committed fraud." Johnson, Nelson, & Pritchard, Do The Merits Matter More? The Impact of the Private Securities Litigation Reform Act, 23 J.L. Econ. & Org. 627, 649 (2007); see also *id.*, at 646-647 (concluding that post-PSLRA litigation is more closely correlated to restatements and abnormal insider stock sales, and less likely to be triggered by voluntary earnings warnings). The PSLRA has also resulted in fewer quick settlements, further indicating a shift away from meritless suits that defendants settle speedily and for small amounts to avoid the expense of defense. See Choi, The Evidence on Securities Class Actions, 57 Vand. L. Rev. 1465, 1496-1498 (2004).

Rather than increasing meritless lawsuits, the PSLRA may have reduced the number of meritorious class actions. One study found that a significant number of non-nuisance suits lacking pre-filing hard evidence, as well as non-nuisance suits involving smaller frauds, would not be brought after the PSLRA. See Choi, Do the Merits Matter Less After the Private Securities Litigation Reform Act?, 23 J.L. Econ. & Org. 598, 598 (2007). Others have similarly cautioned that the PSLRA may screen out meritorious claims. See, *e.g.*, Stout, Type I Error, Type II Error, and the Private Securities Litigation Reform Act, 38 Ariz. L. Rev. 711, 711 (1996) (PSLRA is

insufficiently attentive to the economic costs of "false negatives," or elimination of legitimate fraud claims, as opposed to "false positives"); Talley & Johnsen, Corporate Governance, Executive Compensation, and Securities Litigation, Univ. of S. Cal. Law Sch., Olin Research Paper No. 04-07, at 25 (2004), http://ssrn.com/abstract=536963 (PSLRA has discouraged meritorious litigation in addition to frivolous litigation).

In sum, the empirical evidence does not indicate that accepting petitioners' proposed standard is necessary to further the PSLRA's goal of reducing meritless filings. In fact, the evidence suggests that adopting the strictest possible standard may increase the number of preemptive lawsuits, see S. Rep. No. 107-146, p. 9, and tilt the balance struck by the PSLRA and Sarbanes-Oxley too far in the direction of eliminating meritorious suits. Cf. The Common Sense Legal Reforms Act of 1995, Hearing on H.R. 10 Before the Subcomm. on Telecomms. & Fin. of the H. Commerce Comm., 104th Cong. 1 (1995) (prepared testimony of Arthur Levitt, SEC Chairman), http://www.sec.gov/news/testimony/testarchive/1995/spch025.txt ("Although we might strive for a system in which corporate issuers never spend a dime defending meritless claims, we should recognize that it is impossible to eliminate all meritless cases without also affecting the cases that do have merit and thereby eroding the deterrence provided by private actions.").

2. The PSLRA and Sarbanes-Oxley Have Reduced Agency Costs.

Endorsement of petitioners' proposed standard is also unnecessary to accomplish another principal goal of the PSLRA: the reduction of agency costs resulting from the divergence of interests between plaintiffs, who might hold only a nominal number of shares in the defendant company, and their lawyers. Congress enacted the PSLRA in large part to address "the manipulation by class action lawyers of the clients whom they purportedly represent." H.R. Conf. Rep. No. 104-369, p. 31. Congress was concerned about lawyers inducing "professional plaintiffs" to file suits that extract attorneys' fees at the expense of investors, who either receive inadequate compensation for wrongdoing or bear the costs of settling a meritless case. See *id*., at 32-33; S. Rep. No. 104-98, p. 6.

Congress aimed to stop such "lawyer-driven lawsuits" by "giving control of the litigation to lead plaintiffs with substantial holdings." H.R. Conf. Rep. No. 104-369, p. 32. Accordingly, the PSLRA's procedures for the appointment of lead plaintiffs and lead counsel sought to "increase the likelihood that institutional investors will serve as lead plaintiffs." *Id*., at 34; see also S. Rep. No. 104-98, p. 11 ("The Committee believes that an institutional investor acting as a lead plaintiff can, consistent with its fiduciary obligations, balance the interests of the class with the long-term interests of the company and its public investors."). The PSLRA and Sarbanes-Oxley have achieved that aim.

The percentage of securities class actions with an institutional lead plaintiff has grown significantly since the PSLRA's enactment, and particularly since Sarbanes-Oxley became law. In 1996, unions and pension funds were lead plaintiffs in less than 3% of cases filed. See PricewaterhouseCoopers, 2003 Securities Litigation Study, at 6 (2004), http://10b5.pwc.com/PDF/2003_STUDY_FINAL.PDF. By 2008, that figure had grown to approximately 48%. See Pricewaterhouse Coopers, 2008 Securities Litigation Study, at 26 (2009), http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF.

Controlling for other variables, cases with institutional investors as lead plaintiffs result in higher recoveries for shareholders. See Simmons & Ryan, Post-Reform Act Securities Settlements: 2005 Review and Analysis, at 9 (2006), http://securities.cornerstone.com/pdfs/settlements_2005.pdf (hereinafter 2005 Review and Analysis); see also 2009 Mid-Year Update, at 30 ("Cases with an institutional investor serving as lead plaintiff settle for more than settlements without such an institutional lead plaintiff, other things being equal."); Cox & Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587, 1592 (2006) (finding higher settlements in institutional investor-led cases controlling for estimated provable losses, firm market capitalization, presence of a Securities and Exchange Commission enforcement action, and length of class period).

In addition to evidence that institutional investors obtain better settlements for the injured class members, there is substantial evidence that institutional investors effectively monitor class counsel and negotiate more favorable fee arrangements. For example, in the Cendant litigation, the institutional lead plaintiff negotiated a fee approximately $76 million less than the lowest bid submitted in the trial court's auction, a result that "reflects the broader experience of institutional investors: They are often able to lower counsel fees to one-half to one-third of the historical average of 32% of the recovery." Cox, *supra*, at 1599; see also Fisch, Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction, 102 Colum. L. Rev. 650, 703-714 (2002) (finding negotiation by institutional lead plaintiffs superior to auctions as a method of selecting class counsel). In fact, in settlements over $500 million—those most likely to have an institutional investor as the lead plaintiff—attorneys' fees average only 8% of the settlement amount while attorneys' fees average 25% of the settlement value in settlements less than $500 million. See 2009 Mid-Year Update, at 26.

Finally, institutional investors are motivated to seek corporate-governance reforms as well as accountability from executives, promoting the goal of deterrence. For instance, in the WorldCom case, the New York State Common Retirement Fund made the "highly unusual" demand that outside directors contribute funds from their personal assets to the class-action settlements. 2005 Review and Analysis, at 10;

see also Choi, Fisch, & Pritchard, Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act, 83 Wash. U. L.Q. 869, 901, n.91 (2005) ("public pension fund involvement may" make "private litigation function more like public enforcement, which values deterrence and accountability in addition to compensation").

Because of the PSLRA and Sarbanes-Oxley, the lead plaintiffs in a large and growing proportion of securities class actions are institutions motivated to pursue the interests of the plaintiff class as well as the long-term interests of the defendant company and its public investors. See S. Rep. No. 104-98, p. 11. Thus, experience in cases that have been governed by the PSLRA and Sarbanes-Oxley demonstrates that adoption of petitioners' proposed standard is not needed to achieve those statutes' aims. Indeed, continuing promotion of institutional-investor involvement is the best way to achieve those salutary goals without screening out meritorious suits. Cf. Stout, *supra*, at 715 (focusing on changing the choice of lead plaintiff, instead of making it harder for plaintiffs to bring fraud claims, might do much to address false positive error without unduly increasing the risk of false negative error).

CONCLUSION

For these reasons, the Council urges the Court to recognize the enormous importance that Sarbanes-Oxley and the PSLRA have for the investing public. Congress has carefully constructed a regulatory system that encourages legitimate suits to proceed while discouraging those that lack merit. Instrumental to the proper functioning of this system is the investors' ability to carefully analyze the actions of public companies and weigh the merits of filing suit. Experience demonstrates that this regulatory system should not be changed in a manner that would harm those it seeks to protect.

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October 2009