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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

BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. IN CASES OF "CONSTRUCTIVE" DISCOVERY OF THE FACTS CONSTITUTING A SECTION 10(B) VIOLATION, THE LIMITATIONS PERIOD SHOULD NOT COMMENCE TO RUN UNTIL, AT A MINIMUM, A) PLAN TRUSTEES HAVE INFORMATION, INCLUDING INFORMATION PERTAINING TO *SCIENTER*, THAT IS SO SUGGESTIVE OF POSSIBLE WRONGDOING THAT THEY WOULD REASONABLY HAVE UNDERTAKEN FURTHER INQUIRY TO DETERMINE WHETHER THE FUND HAD A LEGAL CLAIM, AND B) THE TRUSTEES HAVE DISCOVERED, OR IN THE EXERCISE OF REASONABLE DILIGENCE WOULD HAVE DISCOVERED, FACTS THAT IF PLED IN A SECURITIES FRAUD COMPLAINT WOULD BE SUFFICIENT TO WITHSTAND A MOTION TO DISMISS. 5-6

A. Requiring fund trustees to preserve potential causes of action for securities fraud by forcing them to investigate such claims even when they have no information suggesting *scienter* would unduly deplete the resources of pension and welfare plans and/or disable them from vindicating losses caused by wrongdoing.............. 6

TABLE OF CONTENTS—Continued

Page

B. The two year limitations period should not begin to run until, at a minimum, following inquiry notice, fund trustees have discovered, or through the exercise of reasonable diligence would have discovered, facts that if pled in a securities fraud complaint would be sufficient to withstand a motion to dismiss. 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES | Page

Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) ... 7, 11
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) ... 7
J.I. Case Co. v. Borak, 377 U.S. 426 (1964). 11
Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130 (1887) ... 4
Makor Issues & Rights, Ltd. v. Tellabs, Inc., 437 F.3d 588 (7th Cir. 2006) ... 10
Merrill Lynch Pierce Fenner & Smith v. Dabit, 547 U.S. 71 (2006) ... 11
Tellabs Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) ... 10, 11

STATUTES AND REGULATIONS

Securities Exchange Act of 1934:
§ 78j(b), 15 U.S.C § 78j(b) ... 2
§ 78u-4, 15 U.S.C. § 78u-4 ... 2, 7, 8, 9-10

28 U.S.C. § 1658(b) ... 2, 4, 5, 11

Multiemployer Pension Plan Amendments Act of 1980:
§ 3, 29 U.S.C. § 1001a ... 1, 9

Employee Retirement Income Security Act of 1974:
§ 402, 29 U.S.C. § 1102 ... 2
§ 403, 29 U.S.C. § 1103 ... 1
§ 404, 29 U.S.C. § 1104 ... 2, 6

Labor Management Relations Act:
§ 302, 29 U.S.C. § 186 ... 2

17 C.F.R. § 240.10b-5 ... 2

TABLE OF AUTHORITIES

OTHER Page

H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. at 34, *reprinted in* 1995 U.S.C.C.A.N. 733 (1995) 8

H.R. Rep. No. 96-869, 96th Cong., 2d Sess, pt. 1, *reprinted in* 1980 U.S.C.C.A.N. 2918 (1980) 9

INTEREST OF THE *AMICUS CURIAE*

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over thirty years in the development of the law applicable to employee benefit plans.[1] The NCCMP numbers hundreds of multiemployer plans and related organizations among its membership, and it represents their interests in Congress, in rulemaking and in judicial proceedings. The NCCMP has filed numerous *amicus* briefs in this Court advocating for the rights of its members and of the millions of participants and beneficiaries who depend on multiemployer plans for their basic needs.

Pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1169, the benefits provided to the participants and beneficiaries of multiemployer plans are financed through trusts. 29 U.S.C. § 1103(a). To ensure the soundness of plans and their continuing ability to fund benefits, it is commonplace—indeed a practical necessity—that plan assets be invested in securities regulated by the Securities and Exchange Commission. Pension funds affiliated with the NCCMP have billions of dollars invested in the market. The ability of plans to protect those investments from fraudulent practices is a matter of vital concern to the NCCMP.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioners or Respondents authored any part of this brief. Moreover, no person or entity other than the NCCMP made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of all *amicus* briefs have been filed with the Clerk of the Court.

In accordance with Section 302(c)(5)(B) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5)(B), multiemployer plans are governed by boards of trustees composed of representatives half of whom are appointed by labor and half by management. Those trustees exercise fiduciary duties with respect to plan assets, and are expected to hold, invest and protect fund assets for the benefit of participants and beneficiaries. 29 U.S.C. §§ 1102(a)(2), 1104(a)(1). Multiemployer plan trustees are typically laypersons who make investment decisions with the advice and guidance of investment advisors; such trustees are held to a prudence standard in developing and monitoring a fund's investment program. 29 U.S.C. § 1104(a)(1)(B).

Prudent trustees take seriously their obligation to monitor the performance of fund investments, but they must be equally mindful of the need to keep administrative costs to a reasonable level. If questions do arise concerning possible securities fraud under Section 10(b) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. § 78j(b) and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, plan trustees may find themselves in the role of potential plaintiffs in private securities fraud litigation, and possibly of class representatives and/or lead plaintiffs under the provisions of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4. Such actions are governed by the statute of limitations set forth in 28 U.S.C. § 1658(b), which requires that an action be brought within two years after discovery of the facts constituting the violation or five years after the violation, whichever is earlier.

When faced with a potential securities fraud violation, multiemployer plan trustees must consider the

facts at their disposal and determine whether it is a prudent investment of fund assets to explore the possibility of fraud and and/or to retain counsel to consider or pursue litigation. These are not decisions lightly made, in view of the administrative costs involved in these undertakings. However, in some circumstances it may become appropriate for plan trustees to commence litigation to remedy losses to fund assets occasioned by violations of the Act.

The positions asserted in this case by Petitioners and their *amici* would, if adopted by the Court, place multiemployer fund trustees in an untenable position when losses have been suffered as a result of well concealed securities fraud violations. The NCCMP, its member plans, and their trustees, participants and beneficiaries, have a strong interest in a rule of law which will allow trustees a reasonable opportunity to make inquiry once put on notice that the necessary elements of a cause of action may exist warranting legal action. Likewise, they have a strong interest in a rule of law which will not require trustees to choose between filing precipitous lawsuits and foregoing claims that may eventually prove to be meritorious.

Accordingly, the NCCMP urges the Court to affirm the result below and to adopt a limitations rule which will allow multiemployer plan trustees a full opportunity to flesh out and where appropriate litigate—with the necessary facts at hand—actions under Section 10(b) of the Act.

SUMMARY OF ARGUMENT

Private actions under Section 10(b) of the Act must be filed within two years after "the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). In federal statutes with similarly worded limitations periods, this Court has held that both actual and constructive discovery can trigger the running of the statute. *E.g., Kirby v. Lake Shore & Mich. S. R.R.*, 120 U.S. 130, 134-36 (1887). Acting on the assumption that the Court would similarly construe Section 10(b) of the Act, the courts of appeals have developed analytic frameworks for determining when a plaintiff is held to have been on constructive notice of the facts constituting the violation.

It is the NCCMP's position that, at a minimum, a multiemployer plan board of trustees cannot be held to be on constructive notice of a Section 10(b) violation until at least two events have occurred. First, they have received information so suggestive of possible wrongdoing, and covering each element of the Section 10(b) claim—including *scienter*—that they would reasonably have made inquiry to determine whether the fund had a legal claim. Second, the trustees have discovered, or in the exercise of reasonable diligence would have discovered, facts that—if pled in a securities fraud complaint that complies with the pleading requirements of the PSLRA—would be sufficient to survive a motion to dismiss. Until trustees are in, or reasonably could have been in, a position to file such a complaint, the two year limitations period should not commence to run, irrespective of whether they actually undertook

their own investigation upon learning of storm warnings suggestive of fraud.[2]

As discussed below, any more restrictive reading of the limitations period for securities fraud claims would seriously handicap trustees in their ability to make prudent decisions regarding the expenditure of fund assets and the preservation of meritorious claims.

ARGUMENT

I. IN CASES OF "CONSTRUCTIVE" DISCOVERY OF THE FACTS CONSTITUTING A SECTION 10(B) VIOLATION, THE LIMITATIONS PERIOD SHOULD NOT COMMENCE TO RUN UNTIL, AT A MINIMUM, A) PLAN TRUSTEES HAVE INFORMATION, INCLUDING INFORMATION PERTAINING TO *SCIENTER*, THAT IS SO SUGGESTIVE OF POSSIBLE WRONG-DOING THAT THEY WOULD REASONABLY HAVE UNDERTAKEN FURTHER INQUIRY TO DETERMINE WHETHER THE FUND HAD A LEGAL CLAIM, AND B) THE TRUSTEES HAVE DISCOVERED, OR

[2] Although the question is not presented in this case, *see* Brief for Respondents at 22 note 6, the NCCMP strongly disagrees with the position of Merck that potential trustee plaintiffs can be deemed "on notice for purposes of Section 1658(b)" prior to learning that the fund has suffered a loss cognizable under Section 10(b). *See* Brief for Petitioners at 29. Merck's suggestion seemingly would mean that a fund's limitations period could expire prior to the trustees learning of any loss in the value of fund assets. It is the loss, however, that will necessarily inform plan fiduciaries of the possibility of a violation and prompt further inquiry. The Court should reject any approach which would require trustees to expend trust assets in exploring and/or filing premature lawsuits absent any evidence of the necessary "loss" element of the Section 10(b) cause of action.

IN THE EXERCISE OF REASONABLE DILIGENCE WOULD HAVE DISCOVERED, FACTS THAT IF PLED IN A SECURITIES FRAUD COMPLAINT WOULD BE SUFFICIENT TO WITHSTAND A MOTION TO DISMISS.

A. Requiring fund trustees to preserve potential causes of action for securities fraud by forcing them to investigate such claims even when they have no information suggesting *scienter* would unduly deplete the resources of pension and welfare plans and/or disable them from vindicating losses caused by wrongdoing.

Multiemployer fund trustees, generally laypersons working in other, full-time jobs, have a myriad of responsibilities as the named fiduciaries of the plans they serve. They must deal not only with investment decisions and benefit claims, but actuarial determinations, plan design and amendments, benefit enhancements and reductions, compliance with statutory and regulatory schemes such as ERISA and the Internal Revenue Code, and numerous other aspects of plan administration. While trustees typically hire investment managers, actuaries, third party administrators, attorneys and other service providers to assist them in carrying out their fiduciary functions, they remain under an obligation to exercise prudence in the selection and monitoring of such professionals. Ultimately, the trustees must be mindful of their obligation to expend fund assets for the exclusive purpose of providing benefits to participants and beneficiaries and defraying "reasonable" expenses of plan administration. 29 U.S.C. § 1104(a)(1)(A).

When should such fund trustees, who are juggling an array of responsibilities in addition to monitoring the performance of the various investments in the fund's portfolio, be reasonably deemed to be on "inquiry notice" of a Section 10(b) claim? Clearly, the mere loss in value of a security standing alone cannot be deemed to put trustees on notice of the possibility of securities fraud. The elements of a viable Section 10(b) claim include (1) a material omission or misrepresentation, or the use of a manipulative or deceptive device or contrivance, (2) *scienter*, (3) a connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) loss causation (a causal connection between the misrepresentation or deceptive device and the loss). *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

The element of *scienter*, at issue in this case, requires proof of "a mental state embracing intent to deceive, manipulate or defraud." *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Under section 21D(b)(2) of the PSLRA, a private plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind" when pleading a securities fraud violation. 15 U.S.C. §78u-4(b)(2). If plan trustees are deemed to be on inquiry notice of possible fraudulent conduct at points in time when they have no information suggestive of *scienter* then they seemingly must expend fund assets on fishing expeditions which may reap little or no benefit for plan participants. This would create a tension between the trustees' ability to husband plan assets and their vigilance to preserve potential claims for losses due to securities fraud.

In several respects at least, multiemployer plans are the classic type of institutional investor whose participation in securities fraud actions Congress has sought to encourage. In seeking to eliminate abusive practices in securities litigation, Congress enacted detailed "lead plaintiff procedures" in the PSLRA requiring the appointment in a private securities class action of a "lead plaintiff" who is "the member . . . of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C § 78u-4(a)(3)(B)(i). The major purpose behind this provision was to encourage institutional investors, such as the plans affiliated with the NCCMP, to assume leadership roles in securities class actions. *See* H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. at 34, *reprinted in* 1995 U.S.C.C.A.N. 733 (1995) (noting that the PSLRA was enacted to increase the likelihood that institutional investors and other class members with large amounts at stake would serve as lead plaintiffs and explaining 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.")

Requiring trustees, as a condition of becoming eventual plaintiffs, to make questionable expenditures of fund assets in the investigation of claims as to which no information suggesting *scienter* is known will clearly deter this particular group of institutional investors from serving as lead plaintiffs, contrary to Congressional intent in the PSLRA. Moreover, such a reading of the limitations period would be at odds with Congress's express desire in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208, 1209-

10 (1980), to enhance the financial soundness of multiemployer pension plans and to foster their maintenance and growth. *See* MPPAA § 3, 29 U.S.C. § 1001a; H.R. Rep. No. 96-869, 96th Cong., 2d Sess., pt. 1, *reprinted in* 1980 U.S.C.C.A.N. 2918 (1980) (Report of the House of Representatives Committee on Education and Labor on H.R. 3904). These plans should not have to choose between spending fund assets on potentially fruitless investigations, on the one hand, and preserving the right to recover economic losses caused by successfully concealed fraudulent activity on the other.

Accordingly, it is the position of the NCCMP that information suggestive of *scienter* is a necessary component of inquiry notice.

B. The two year limitations period should not begin to run until, at a minimum, following inquiry notice, fund trustees have discovered, or through the exercise of reasonable diligence would have discovered, facts that if pled in a securities fraud complaint would be sufficient to withstand a motion to dismiss.

The determination of when the two year limitations period commences to run must necessarily take into consideration the special and stringent pleading requirements of the PSLRA. The Act requires a plaintiff to specify each statement alleged to have been misleading, as well as the reasons why the statement is misleading, and—if an allegation regarding the statement or omission is made on information and belief—to state with particularity all facts on which that belief is formed. 15 U.S.C. § 78u-4(b)(1)(B). Further, "with respect to each act or

omission alleged to violate this chapter," a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

In *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the Court noted that the PSLRA's "strong inference" standard "'unequivocally raise[d] the bar for pleading scienter . . . .'" 551 U.S. at 321, *quoting Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 601 (7th Cir. 2006). Under *Tellabs*, in determining whether a plaintiff has met the heightened pleading requirements pertaining to *scienter*, a reviewing court must engage in "a comparative evaluation" which considers not only the inferences urged by the plaintiff, but also any "competing inferences rationally drawn from the facts alleged." 551 U.S. at 314. To survive a motion to dismiss, the allegations of the complaint must be such that "a reasonable person would deem the inference of scienter cogent and at least as compelling" as any "plausible nonculpable explanations for the defendant's conduct . . . ." Id. at 324.

An investor who has merely been put on "inquiry notice" that a potential defendant may have acted with *scienter* in making misrepresentations forming the basis of a securities fraud claim thus still faces a significant hurdle in unearthing and pleading sufficient facts to survive a motion to dismiss. As is demonstrated in the case at bar, it can take years before facts sufficiently probative of a company's intent to deceive see the light of day. Congress did not intend in the PSLRA to stop meritorious suits from going forward; it simply enhanced the pleading standards by requiring a plaintiff to muster facts

raising a "cogent and compelling" inference of *scienter* before commencing litigation. *Id*.

Until such facts have been mustered, or reasonably could have been mustered, the two year limitations period cannot logically begin to run. The contrary rule urged by Petitioners and their *amici*—as even they concede—could operate to force plaintiffs to file suit before they are in possession of the minimum necessary facts to avoid dismissal. *E.g*., Brief for the Petitioners at 31 (acknowledging that, under Petitioners' analysis, a plaintiff may be unable to file a complaint sufficient to withstand a motion to dismiss until after the statute of limitations has expired.) This would almost certainly mean forfeiture of claims, an absurd and unnecessary result. An interpretation allowing plan trustees, at a minimum, two years from discovery of the facts comprising the violation, *i.e*., facts sufficient to defeat a motion to dismiss, is both sensible and faithful to the express language of 28 U.S.C. § 1658(b).

Private enforcement of federal antifraud securities laws is an important supplement to the regulatory efforts of the Department of Justice and the Securities and Exchange Commission. *See Dura Pharmaceuticals Inc. v. Broudo*, 544 U.S. 336, 345 (2005); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). Indeed, private securities litigation is "'an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *See Tellabs Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308 321 n.4 (2007), *quoting Merrill Lynch Pierce Fenner & Smith v. Dabit*, 547 U.S. 71, 81 (2006). Thus there is a significant public interest in allowing institutional investors, such as those affiliated with the NCCMP, a reasonable oppor-

tunity to develop and pursue meritorious actions under Section 10(b).

As discussed above, the special fiduciary responsibilities of multiemployer plan trustees to protect and preserve trust assets, and their occasional need to pursue claims for misconduct that have resulted in losses to the trust, likewise militate for an interpretation of the statute of limitations that allows them a fair opportunity to address possible securities fraud claims. Prudent fund management would be seriously undermined by a rule that required trustees to choose between expensive and potentially fruitless rushes to the courthouse and possible permanent loss of as yet inchoate claims. These trusts, it should be emphasized, are the source of pension, medical and other benefits for millions of Americans. A diminishment in the value of trust assets can affect participants and beneficiaries in their daily lives.

These considerations clearly favor allowing trustees a reasonable opportunity to discover facts sufficient to survive a motion to dismiss before the two year period begins to run. They also disfavor the suggestion of some of Petitioners' *amici* that an investor who—upon inquiry notice—does not promptly commence an independent investigation is time-barred at the moment inquiry notice was received. *See, e.g.*, Brief for the Chamber of Commerce of the United States of America Supporting Petitioners at 25-26; Brief of the Securities Industry and Financial Markets Association as *Amicus Curiae* in Support of Petitioners at 8; Brief of DRI—The Voice of the Defense Bar as *Amicus Curiae* in Support of Petitioners at 2. Such a rule would impose new, cumbersome and unwarranted pleadings requirements on plaintiffs. *See, e.g.*, Brief of the Securities

Industry and Financial Markets Association as *Amicus Curiae* in Support of Petitioners at 8 (plaintiff would have to plead what investigatory steps it took, what it discovered and when, and what specific newly discovered facts now enable it to plead *scienter*.) Such a rule would also force multiemployer plan trustees, large or small, to expend fund assets on potentially fruitless investigations every time a "storm warning" appeared, or risk forfeiting meritorious securities fraud actions.

Petitioners' *amici* suggest that the equities disfavor a so-called "dilatory" plaintiff who does not immediately mount his own investigation of any conceivable fraud claim. *See, e.g.*, Brief for the Chamber of Commerce of the United States of America Supporting Petitioners at 25-26; Brief of DRI—The Voice of the Defense Bar as *Amicus Curiae* in Support of Petitioners at 2. Such a sweeping generalization fails to account for the fact that it may not be prudent for trustees to chase down every conceivable wrongdoing that may have diminished the value of a security. In any event, the balance of the equities surely favors a multiemployer fund that did not mount a hunting expedition upon the first sighting of a stormcloud, as opposed to a corporation the full scope of whose deceitful conduct has been shrouded in secrecy to the detriment of its investors.

CONCLUSION

For the reasons stated above, the result below should be affirmed.

Respectfully submitted,

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